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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 72

DAVID WALTON CRAMP, JR., APPELLANT,

vs.

BOARD OF PUBLIC INSTRUCTION OF
ORANGE COUNTY, FLORIDA

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

FILED MARCH 27, 1961
JURISDICTION POSTPONED MAY 29, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 72

DAVID WALTON CRAMP, JR., APPELLANT,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

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[fol. 1]

IN THE CIRCUIT COURT OF THE 9th JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

IN CHANCERY

No. 38699

DAVID WALTON CRAMP, JR., Plaintiff,

vs.

THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, a body corporate, Defendant.

COMPLAINT—Filed January 11, 1960

The plaintiff, by his undersigned attorneys, states:

1. The plaintiff is a resident of Orange County, Florida, and is over the age of twenty-one years.

2. The defendant is a body corporate created by the Legislature of the State of Florida, and is charged with the administration of the public schools located in Orange County, Florida.

3. The plaintiff has been employed by the defendant for nine years last past in the capacity as teacher, and is now employed in that capacity at William R. Boone High School, located in the City of Orlando, County of Orange and State of Florida.

4. The plaintiff has been requested by the principal of the said high school (one of the instructional personnel employed by the defendant) to subscribe to the following oath prescribed by F.S. §876.05 as follows:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby

solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, sup-
[fol. 2] port, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States of of (sic) Florida by force or violence."

5. Plaintiff has been advised that the execution of said oath is a statutory prerequisite to his continued employment by the defendant, and that upon his failure to subscribe to said oath, he can be immediately discharged and his name can be removed from the payroll of the defendant.

6. The plaintiff avers that he has, does and will support the Constitution of the United States and of the State of Florida; he is not a member of the Communist Party; that he has not, does not and will not lend, aid, support, advice, counsel or influence to the Communist Party; he does not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; he is not a member of any organization or party which believes in or teaches directly or indirectly the overthrow of the Government of the United States or of Florida by force or violence.

7. The plaintiff is a loyal American and does not decline to execute or subscribe to the aforesaid oath for fear of the penalties provided by law for a false oath.

8. The plaintiff avers, however, that the requirement of the statutes of Florida and of the defendant that he execute the said oath as a condition precedent to his continuing employment by the defendant is a violation of his rights as a free, loyal American citizen as guaranteed by the First and the Fourteenth Amendments to the Constitution of the United States and Sections 12, 13 and 15 of the Decla-

ration of Rights and Article 16, Section 2 of the Constitution of the State of Florida. The said oath, insofar as [fol. 3] it requires plaintiff to swear or affirm that he has not lent aid, support, advice, counsel or influence to the Communist Party is an ex post facto law, illegally retroactive, and deprives him of liberty and property in violation of due process of law guaranteed by the Fourteenth Amendment of the United States Constitution; that the aforesaid oath, insofar as it requires plaintiff to swear or affirm that he has not and will not lend aid, support, advice, counsel or influence to the Communist Party without the qualification that he has not *knowingly* and will not *knowingly* lend aid, support, advice, counsel or influence to the Communist Party, is arbitrary and capricious and deprives plaintiff of due process of law guaranteed by the Fourteenth Amendment; that the aforesaid oath, insofar as it requires plaintiff to swear or affirm that he is not a member of any organization or party which believes in or teaches, directly or indirectly, overthrow of the Government of the United States or of the State of Florida by force or violence without the qualification that he is not a member of any organization or party which to his knowledge so believes or teaches, is arbitrary and capricious and deprives plaintiff of due process of law guaranteed by the Fourteenth Amendment; that the aforesaid oath, insofar as it seeks to deprive plaintiff of his employment for failure to swear or affirm that he is not a member of the Communist Party and has not lent his aid, support, advice, counsel or influence to the Communist Party and is not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of the State of Florida by force or violence, is a bill of attainder and unconstitutional under § Art. I, §9 of the United States Constitution; and that the requirement of the oath in its entirety deprives [fol. 4] plaintiff of freedom of association and due process of law guaranteed by the First and Fourteenth Amendments of the United States Constitution.

9. For the reasons above set forth, the plaintiff declines to execute or subscribe to the oath as set forth in F.S. 876.05.

10. The plaintiff fears that the defendant will discharge or attempt to discharge him from its employ as a consequence of his declining to execute or subscribe to the said oath.

11. The action of the defendant in discharging or attempting to discharge the plaintiff from its employ would constitute irreparable damage, harm and injury to the plaintiff in that he would be unable to work as a teach, (sic) the work for which he has been trained and in which he has specialized for approximately ten years last past.

12. The plaintiff is in doubt as to his rights and obligations with regard to the defendant as the same are affected by a statute whose validity and constitutionality is questioned by the plaintiff, and the plaintiff desires a declaration of his rights and status thereunder.

Wherefore and by reason of the foregoing, the plaintiff prays that this Honorable Court take jurisdiction of the within cause and determine the validity of F.S. 876.05 et seq., insofar as the same is applicable to the plaintiff, if at all, and to construe the plaintiff's rights and obligations thereunder as an employee of the defendant, and pending such determination to temporarily enjoin the defendant from discharging or attempting to discharge the plaintiff from its employ, and upon a final determination of the rights, obligations and status of the plaintiff under the provisions of F.S. 876.05 et seq. to permanently enjoin the defendant from requiring that the plaintiff execute the [fol. 5] oath required by F.S. 876.05 and to permanently enjoin the defendant from discharging the plaintiff for his failure to execute the said oath.

Tobias Simon and Howard W. Dixon, Attorneys for Plaintiff, 706 Ainsley Building, Miami, Florida.

By: Tobias Simon.

Duly sworn to by David Walton Cramp, Jr., jurat omitted in printing.

Certificate of Service (omitted in printing).

[fol. 6]

IN THE CIRCUIT COURT OF ORANGE COUNTY

ANSWER OF DEFENDANT—Filed March 9, 1960

Comes now Defendant by its undersigned attorneys and for answer to the complaint filed herein says:

1. Defendant admits the allegations of Paragraph 1 of the complaint.

2. Defendant admits the allegations of Paragraph 2 of the complaint.

3. Defendant admits the allegations of Paragraph 3 of the complaint.

4. Defendant admits the allegations of Paragraph 4 of the complaint. Defendant further avers that recently the County Superintendent of Public Instruction of Orange County, Florida, discovered that plaintiff had never executed the oath prescribed by Section 876.05, Florida Statutes, and the County Superintendent thereupon transmitted a form embodying such oath to the principal of said high school with the request that such principal get the same executed by plaintiff. The principal thereupon, either personally or by an employee of defendant working in the principal's office, submitted said oath to the plaintiff but plaintiff refused to execute same. After the principal personally discussed the matter with the plaintiff, who persisted in his refusal, the principal reported such refusal to the County Superintendent. The said County Superintendent then intended to discuss the matter with plaintiff in the hope that plaintiff would reconsider his refusal to execute the oath and proceed to execute the oath, but the Christmas Holidays intervened and before the County Superintendent had an opportunity to discuss the matter with plaintiff, plaintiff instituted this suit.

5. Defendant is without knowledge of the truth of the allegations of Paragraph 5 of the complaint.

[fol. 7] 6. Defendant is without knowledge of the truth of the allegations of Paragraph 6 of the complaint.

7. Defendant is without knowledge of the truth of the allegations of Paragraph 7 of the complaint.

8. Defendant denies the allegations of Paragraph 8 of the complaint.

9. Defendant admits that plaintiff has declined to execute the oath set forth in Section 876.05, Florida Statutes, and admits that by Paragraph 9 of his complaint plaintiff declines to execute said oath for the asserted reason that said Section 876.05 is unconstitutional.

10. Defendant is without knowledge of the truth of the allegations of Paragraph 10 of the complaint.

11. Defendant denies the allegations of Paragraph 11 of the complaint.

12. Defendant is without knowledge of the truth of the allegations of Paragraph 12 of the complaint.

J. R. Wells, Allen McCormick, Of Maguire, Voorhis & Wells, 135 Wall Street (P.O. Box 633), Orlando, Florida, Attorneys for Defendant.

[fol. 8]

IN THE CIRCUIT COURT OF ORANGE COUNTY

STIPULATION—March 11, 1960

The defendant having filed its Answer herein and the plaintiff desiring to set the case down for hearing on bill and answer and the defendant being willing that the case be heard on bill and answer, it is stipulated as follows:

1. Plaintiff hereby sets this case down for hearing on bill and answer.

2. This case may be forthwith determined by the Court on bill and answer.

• • • • • • •

Dated: March 11, 1960.

J. R. Wells, Allen K. McCormick, Of Maguire, Voorhis & Wells, 135 Wall Street (P.O. Box 633), Orlando, Florida, Attorneys for Defendant.

Tobias Simon, ..., 706 Ainsley Building, 14 N.E. First Avenue, Miami 32, Florida, Attorneys for Plaintiff.

[fol. 9]

IN THE CIRCUIT COURT OF ORANGE COUNTY

MEMORANDUM OPINION—March 16, 1960

The pertinent question rajsed by the pleadings on bill and answer is whether the requirement of F.S. 876.05 et seq. as a condition precedent for the payment of public funds to a state employee violates the State and Federal Constitutions.

Although plaintiff by his sworn complaint, has in effect, plainly shown that he may, if he so desires, execute the required oath without fear of the penalties required by the law for a false oath, nevertheless he complains that the Act requiring the execution of a loyalty oath as a condition for public employment is a violation of due process. The Florida Supreme Court, in State vs. Diez, 97 So.2d, 105 held:

> "In fine, we think the loyalty oath may be required without interfering with the Federal Government's operations against sedition; *we think the pertinent law does not offend against the Constitution;* we think the Act was intended to have a retrospective effect;" (emphasis supplied).

The State of Florida, acting through its duly elected representatives has the inherent right, through statutory law, to impose reasonable conditions precedent for public employment. Under the provisions of the challenged Act an employee of the State has his freedom of association as well as freedom of speech and the privilege of advocating ideas secured to him by the First Amendment to the Constitution of the United States so long as he can conscientiously execute the oath required by law. If he cannot do so he has the freedom of seeking employment elsewhere. The State has the right to preserve its integrity by requiring its employees, as one of the prerequisite conditions of employment, to subscribe to the loyalty oath. This is an inherent right secured to the body politic and under such circumstances the freedoms secured to the individual employee by the Constitution become subservient.

[fol. 10] Plaintiff contends that the oath required by F.S. 876.05 is unconstitutional by reason of the failure to contain the elements of wilfulness and scienter. This contention was answered by the Florida Supreme Court in State vs. Diez, 97 So.2d, 105:

> "This conclusion does not lead to a decision declaring the Act unconstitutional because we think it is inherent in the law that when one takes the oath that he has not lent aid, advice, counsel and the like to the communist party, he is representing under oath that he has not done so knowingly."

It therefore follows that F.S. 876.05 et seq. is constitutional and is mandatory as a condition precedent for public employment.

Since the defendant has denied the allegations in Paragraph 11 of the Complaint such allegations may not be considered as being proven on bill and answer. Therefore the prayer for a permanent injunction in all respects should be denied for the reason stated herein.

Dated at Orlando, Florida, March 16, 1960.

Roger A. Barker, Circuit Judge.

[fol. 11]

IN THE CIRCUIT COURT OF ORANGE COUNTY

FINAL DECREE—March 16, 1960

This cause having been set down by plaintiff for hearing on bill and answer, and the parties having stipulated that the parties might, on or before Monday, March 14, 1960, submit to the Court for its consideration copies of any briefs used before the Supreme Court of Florida by the parties or by the amicus curiae on this litigation as well as any other memorandum briefs or copies of decisions that the parties might wish to submit, and that the Court might thereupon dispose of the case without a formal oral argument and without other or further notice, and the Court having examined and studied the pleadings herein together with copies of briefs used before the Supreme

Court of Florida and other memorandum briefs and decisions as aforesaid submitted to the Court for its consideration as aforesaid, and the Court after due consideration being fully advised in the premises and being of the opinion that plaintiff is entitled to a determination regarding the constituionality (sic) and validity as to him of Sections 876.05 or 876.06, Florida Statutes, and the Court having concluded from its study that said Sections 876.05 and 876.06, Florida Statutes, are constitutional and valid as to plaintiff for the reasons stated in its memorandum opinion filed herein,

It Is Ordered, Adjudged and Decreed that said Sections 876.05 and 876.06, Florida Statutes, are hereby declared, determined and adjudged to be constitutional and valid as to plaintiff and not subject in any respect to the attacks made on same by plaintiff in his complaint.

It Is Further Ordered, Adjudged and Decreed that the plaintiff's prayer for a permanent injunction be and the same is hereby denied in all respects.

[fol. 12] Done and Ordered at Orlando, Florida, this 16th day of March, A. D. 1960.

Roger A. Barker, Circuit Judge.

[fol. 14]

IN THE CIRCUIT COURT OF ORANGE COUNTY

ASSIGNMENTS OF ERROR—Filed March 25, 1960

The plaintiff assigns as the errors on which he intends to rely in the Supreme Court of Florida for reversal of the final decree of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, appealed from, the following:

1. The Court erred in making and entering its final decree of March 16, 1960, for the reason that the said final decree is contrary to law.

2. The Court erred in making and entering its final decree of March 16, 1960, for the reason that the said final decree violates the rights guaranteed to the plaintiff by the First and Fourteenth Amendments to the Constitution of the United States, and Sections 12, 13 and 15 of the Declaration of Rights of the Constitution of the State of Florida, and Article 16, Section 2, of the Constitution of the State of Florida, in that inter alia that insofar as the plaintiff has been required to comply with the provisions of F.S. 876.05, he has been required to obey an ex-post-facto law, he has been subjected to a bill of attainder, he has been compelled to take action to swear or affirm as to his past actions without the inclusion that he has not knowingly done the actions and matters forbidden by the aforesaid Statute, he has been deprived of the due process of law and of the equal protection of the law.

I Hereby Certify that a true copy of the above Assignments of Error was mailed this 23rd day of March, 1960, to Maguire, Voorhis & Wells, attorneys for defendant, 135 Wall Street, Orlando, Florida.

Howard W. Dixon and Tobias Simon, Attorneys for Plaintiff, 706 Ainsley Building, Miami, Florida, By Tobias Simon.

[fol. 15]

IN THE SUPREME COURT OF FLORIDA

July Term, A. D. 1960

Case No. 30,598

DAVID WALTON CRAMP, JR., Appellant,

vs.

THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, Appellee.

OPINION—Filed November 16, 1960

An Appeal from the Circuit Court for Orange County, W. A. Pattishall, Judge.

Tobias Simon and Howard Dixon, for Appellant.

J. R. Wells and Allen K. McCormick of Maguire, Voorhis & Wells, for Appellee.

Richard W. Ervin, Attorney General, Ralph E. Odum and William J. Roberts, Assistant Attorneys General, for Appellee.

Thornal, J.

Appellant Cramp who was plaintiff below seeks reversal of a final decree sustaining the validity of Sections 876.05-876.06, Florida Statutes.

We must decide whether the cited statute, which prescribes a so-called "loyalty oath" as a condition to public employment, offends various provisions of the State and Federal Constitutions.

Plaintiff Cramp had served approximately nine years in the public school system of Orange County. It was then discovered that through an oversight, he had never been required to execute the oath required by Section 876.05, Florida Statutes. The appellee Board immediately demanded that the oath be executed. The school teacher-

[fol. 16] appellant refused. He based his refusal on the contention that the statutory requirement of the execution of the oath as a condition to continuing his employment as a public school teacher violated certain constitutional rights. Fearing dismissal he filed his complaint for a declaratory decree. He sought a temporary injunction against dismissal pending the litigation, and an ultimate decree adjudicating the invalidity of the statute. The chancellor denied the temporary restraining order. Cramp v. Board of Public Instruction, Fla., 118 So. 2d 541. On final hearing the chancellor upheld the statute against appellant's assault. The prayer for a permanent injunction was denied. By direct appeal, Article V, Section 4, (2), Florida Constitution, we are requested to reverse the final decree.

Appellant Cramp contends here, as he did in the trial court, that the subject statute is fatally vulnerable on various constitutional grounds. In sum, it is his position that the Florida loyalty oath statute is defective because it fails to specify knowledge or scienter as an element of the proscribed conduct. Appellant also contends that the statute destroys the traditional presumption of innocence and shifts the burden of proof by legislative enactment without due process; it is claimed that the statute is a bill of attainder and an ex post facto law and that it is so vague that it is unintelligible. Cramp claims that the Federal government has pre-empted the field of sedition control. Finally, he says that the Florida constitutional oath prescribed by Article XVI, Section 2, is exclusive and, therefore, does not permit any additional legislative prescription.

The appellee School Board by its brief undertakes to defend the statute against each of the attacks leveled by the appellant.

By Section 876.05, Florida Statutes, all persons employed by the State or any county or city, or school board, are required to subscribe to the following oath:

> "I, ... a citizen of the State of Florida and of the United States of America, and being em-
> [fol. 17] ployed by or an officer of ..... and

> a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

It is required that the oath be filed with the employing governmental agency prior to the approval of any salary voucher. Section 876.06, Florida Statutes, provides for the discharge of any person who refuses to subscribe to the quoted oath.

Sections 876.05-876.06 supra, were Sections 1 and 2, Chapter 25046, Laws of Florida, 1949. We have concluded that the chancellor ruled correctly in upholding the statute against the appellant's attack.

With as much brevity as the importance of the question permits we shall proceed to dispose of each of appellant's contentions.

It is asserted that the prescribed oath does not include an element that the maker thereof had knowledge of the subversive nature of the affiliations at the time he engaged in them. In other words, appellant contends that a man should not be held liable for a false oath if he swears to non-subversive associations when in effect, he is or has been innocently and unknowingly aligned with a subversive or-[fol. 18] ganization. We think this matter has been placed at rest by us as well as by the Supreme Court of the United States. In State v. Diez, Fla., 97 So. 2d 105, we held that the element of scienter was implicit in each of the requirements of the statute. Conceding the essentiality of this element, we there upheld the statute with our interpretation to the effect that implied in each requirement was the presence of scienter or knowledge. Although appellant

avers that this constitutes "a judicial amendment of the statute" we find ourselves supported in such an interpretation by respectable authority. Lerner v. Casey, 357 U. S. 468; Adler v. Board of Education, 342 U. S. 485, 27 A.L.R. 2d 472; Garner v. Board of Public Works, 341 U. S. 716; Gerende v. Board of Supervisors, 341 U. S. 56.

We are not disturbed by appellant's reliance on Wieman v. Updegraff, 344 U. S. 183. While this decision involved a similar loyalty oath, the highest court of the State of Oklahoma had held that the element of scienter was not essential to validity and also that it was absent from the requirements of the act. The Supreme Court of the United States merely accepted the Oklahoma court's interpretation of its State statute as to the implication of scienter. The United States Court reversed when it held that scienter was essential. On the other hand, the implication of scienter was sustained in those decisions which we have cited to support our view.

We think the time is now passed when statutes of this type are subject to question because of alleged pre-emption of the field of subversive control by the Federal Government. Appellant presses his claim in this regard with continued reliance on Commonwealth of Pennsylvania v. Nelson, 350 U. S. 497. In sustaining this same statute against the same attack in Diez v. State, supra, we indicated our view that Nelson did not preclude paralleling state action on the same problem. We specifically so held in Gibson v. Florida Legislative Investigation Committee, Fla. 1959, 108 So. 2d 729, cer. den. 360 U. S. 919. The Supreme Court of [fol. 19] the United States similarly announced its own position on the same subject in Uphaus v. Wyman, 360 U. S. 72. Moreover, we could actually lay aside this contention on the further ground that the instant statute legitimately prescribes an element of required qualifications precedent to public employment. The statute under discussion is merely a legislative enactment asserted within the orbit of the state's police power. It simply stipulates certain conditions under which individuals can work for the State. The subversive control aspect is involved only tangentially. The primary objective of the statute is to exclude from public employment persons lacking in the stipulated qualifi-

cations or in converse, persons burdened with stipulated disqualifying qualities. Beilan v. Board of Public Education, 357 U. S. 399; Adler v. Board of Education, 342 U. S. 485, 27 A.L.R. 2d 472; Lerner v. Casey, 357 U. S. 468; Thorp v. Board of Trustees, 6 N. J. 498, 79 A. 2d 462; Nostrand v. Balmer, Wash., 335 P. 2d 10, but see Nostrand v. Little, 362 U. S. 474; Laba v. Newark Board of Education, 23 N. J. 364, 129 A. 2d 273; Appeal of Albert, 372 Pa. 13, 92 A. 2d 663; Fitzgerald v. City of Philadelphia, 376 Pa. 379, 102 A. 2d 887; Kaplan v. School District of Philadelphia, 388 Pa. 213, 130 A. 2d 672; State ex rel. Schweitzer v. Turner, 155 Fla. 270, 19 So. 2d 832.

Appellant contends further that the oath prescribed by Section 876.05, supra, is unconstitutional for the reason that it imposes requirements additional to those stated in the constitutional oath prescribed by Article XVI, Section 2, Florida Constitution. To this end we are requested to follow the decision of the Supreme Court of New Jersey in Imbrie v. Marsh, 3 N. J. 578, 71 A. 2d 352, 18 A.L.R. 2d 241. Were we inclined to concur in the decision of the New Jersey Supreme Court on this point and we interpolate that we are not, we are here led by the facts of the instant case to distinguish the situation before us from that presented in the New Jersey matter. It was there held that a loyalty oath in addition to the stipulated constitutional oath similar to ours, could not be imposed upon candidates for the office of governor or members of the Legislature. [fol. 20] We do not have a state officer involved here. The Florida Constitution requires that the oath be taken by "each and every officer of this State, . . ." The appellant Cramp is a school teacher and therefore, an employee as distinguished from an officer in the constitutional sense. State ex rel. Holloway v. Sheats, 78 Fla. 583, 83 So. 508; IX U. Fla. L.R. 47 (Spring 1956). The constitutional oath prescribed by Article XVI, Section 2, supra, must be taken by all state officers but is not a stipulated requirement of an employee. New Jersey itself has made the distinction. Thorp v. Board of Trustees, 6 N. J. 498, 79 A. 2d 462. Hence, appellant is not in a class adversely affected by the statutory requirement on this point, and is therefore not in a position to gain support from this argument.

In practically all the cases decided by the Supreme Court of the United States on the subject of loyalty oaths as a condition to public employment attacks have been directed on the ground of alleged vagueness, on the contention that freedom of speech and assembly are impinged and that the presumption of innocence is destroyed. In each instance dealing with similar statutes and similar situations the United States Supreme Court has consistently upheld the statutes against such assaults. Certainly the instant statute is perfectly clear in its requirements. There could be no doubt in the minds of anyone who can read English as to the requirements of the statute and the effect of a failure to comply. Adler v. Board of Education, supra.

It has long been recognized that the First Amendment freedoms are not absolutes in and of themselves. When they are asserted as a barrier to government action we are confronted by the necessity of balancing the asserted private right against the alleged public interest. The private right will certainly not be lightly regarded. However, an indirect adverse effect on the asserted right of the individual will not preclude the exercise of governmental power when the power is shown to exist and its assertion is necessitated by the exigencies of the public wellbeing. Barenblatt v. United States, 360 U.S. 109.

[fol. 21] As we have pointed out in other parts of this opinion, the failure to take the required oath does not work an adjudication of guilt nor does it burden the employee with the responsibility of proving innocence against an assertion of guilt. Statutes of this type have been consistently sustained on the theory that they constitute merely a stipulation of qualifications or disqualifications for public employment. The statute contains no prohibition against the right of a citizen to speak out or to assemble peaceably. It merely provides that when one speaks out to advocate the violent overthrow of the government of the United States, or assembles for that purpose, he cannot simultaneously work for and draw compensation from the government he seeks to overthrow.

Finally we proceed to what is probably the most difficult aspect of the instant statute. So far as we have been able to ascertain, Florida is the only state which requires the

employee to swear " . . . that I have not lend [lent] my aid, support, advice, counsel or influence to the Communist Party; . . . " Others might have similar provisions but we have been referred to none. This particular provision was upheld in Diez v. State, supra. In that opinion also, we construed the word "lend" as meaning "lent" when applied to the oath regarding past conduct. We are again fronted by the contention that the Florida Statute constitutes a bill of attainder prohibited to the states by Article I, Section 10, Constitution of the United States. This is so, asserts the appellant, because when the employee is required by law to take an oath that he has not at any time in the past aided or supported the Communist Party, or else suffer the pain of dismissal, the Legislature is adjudicating his guilt without benefit of trial and an opportunity to defend. Appellant refers to the recognized definition of a bill of attainder as a legislative enactment which adjudicates guilt without benefit of judicial trial. He points further to the prohibition against ex post facto laws which precludes giving retroactive effect to past conduct in order to support present punishment. Article [fol. 22] I, Section 10, supra. For reasons we hereafter mention, the Supreme Court of the United States has upheld similar statutes against similar assaults. We must confess recognition of the necessity to subordinate our own conclusions to those of the higher authority on the subject. However, we find it in most instances a little difficult to reconcile the recent decisions of the United States Court with its earlier precedents in Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356 and ex parte Garland, 4 Wall. 333, 18 L. Ed. 366. Moreover, the opinion of this Court in McNealy v. Gregory, 13 Fla. 417, clearly committed Florida to the ruling of the Cummings decision.

In recent years, however, the Supreme Court of the United States has, with almost invariable consistency, construed Cummings and Garland as involving a situation in which there was no reasonable relationship between the past conduct proscribed and the then current business or profession from which it was sought to exclude an individual solely account of his past conduct. In other words, the United States Court has merely held that there was no

reasonable relationship between the profession of the Catholic Priest in Cummings, or that of the lawyer in Garland and the proscribed past conduct of having had affiliations with the then defeated Confederacy. This Court has likewise so construed Cummings and Garland. Page v. Watson, 140 Fla. 536, 192 So. 205; Diez v. State, supra. As stated above, this position is supported by numerous recent decisions of the Supreme Court of the United States. Hawker v. New York, 170 U. S. 189; Garner v. Board of Public Works, 341 U. S. 716; Adler v. Board of Education, 342 U. S. 485; Beilan v. Board of Public Education, 357 U. S. 399.

In view of these interpretations of Cummings and Garland we find no difficulty in concluding that there is a reasonable relationship between the vital profession of teacher in the public school system and past associations with subversive organizations. Beilan v. Board of Education, supra; Adler v. Board of Public Instruction, supra. [fol. 23] In this connection, however, we deem it appropriate to indicate a concern over the exercise of this power to proscribe long past conduct. The imposition of sanctions as retribution for past acts has potentials for impinging upon many of our traditional concepts of due process, property rights, and fair play in the multitudinous relationships between the individual and his government. However, for reasons hereafter stated, we find it unnecessary to decide whether denial of public employment could be construed as "punishment" within the prohibition against ex post facto laws. Speiser v. Randall, 357 U. S. 513. Solution to that problem will have to await the appropriate case. McNealy v. Gregory, supra.

By the allegations of his complaint, the appellant under oath affirmatively denied any present or past associations which would preclude him from executing the subject oath. He stated in his complaint " . . . that he has not, does not, and will not lend (sic) aid, support or advice (sic) counsel or influence to the Communist Party; . . . " Further, the appellant disavows any belief in the violent overthrow of either the State or Federal government. He denies membership in any organization which believes in or teaches such conduct. The complaint alleges that appellant "is a loyal

American" and he states that he does not decline to execute the required oath because of fear of penalties for the making of a false oath.

Appellant comes into court seeking a declaratory decree to determine his rights under the subject statute. He claims that the mere requirement of the oath impinges on his constitutional freedoms and therefore entitles him to the declaratory decree. However, in order to obtain an adjudication of the invalidity of a statute the appellant must carry the burden of demonstrating that the enforcement of the law would adversely affect him. It being clear from the allegations of his own complaint that he has never been affiliated with any proscribed association, we are not persuaded that the requirement that he so state under oath could adversely affect him. In other words, there could [fol. 24] not possibly be a legislative adjudication of guilt for the simple reason that the complaint on which appellant stands affirmatively points out that appellant has never been connected with any organization that could result in guilt. Furthermore, as to this appellant the statute could not constitute an ex post facto law for the obvious reason that appellant asserts that he has never in the past been connected with any association which could lead to current punishment. In short, because of the allegations of his own complaint the appellant teacher has unequivocally demonstrated that he has no standing to assault the subject statute on the grounds that it is a bill of attainder, or an ex post facto law.

We have thoroughly considered every aspect of the appellant's contentions. We have studied all of the authorities submitted by the parties and many others produced by our own research. We fail to find any error in the decree under attack and it is therefore affirmed.

It is so ordered.

Thomas, C.J., Terrell, Hobson, Drew and O'Connell, JJ., and Mason, Circuit Judge, concur

[fol. 25]

IN THE SUPREME COURT OF FLORIDA

July Term A. D. 1960

DAVID WALTON CRAMP, JR., Appellant,

vs.

THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, a body corporate, Appellee.

JUDGMENT—November 16, 1960

This cause having heretofore been submitted to the Court upon the transcript of record of the decree herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and decreed by the Court that the said decree of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellee do have and recover of and from the Appellant costs in this behalf expended, except the $25.00 filing fee which has been paid by the Appellant, and that all costs shall be taxed in the Court in which the appeal was entered, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice Thornal was this day ordered to be filed.

[fol. 27]

IN THE SUPREME COURT OF FLORIDA

ORDER DENYING PETITION FOR REHEARING—January 17, 1961

On consideration of the Petition for Rehearing filed by Attorneys for Appellant,

It Is Ordered by the Court that the said petition be, and the same is hereby, denied.

[fol. 28]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DAVID WALTON CRAMP, JR., Appellant,

vs.

THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice Is Hereby Given that David Walton Cramp, Jr., the Appellant above named, hereby appeals to the Supreme Court of the United States from the Final Decree of the Supreme Court of Florida sustaining the validity of Sections 876.05 and 876.06, Florida Statutes, entered herein on November 16, 1960 (Petition for Re-Hearing thereon having been denied by Order of the Supreme Court of Florida on January 17, 1961).

This appeal is taken pursuant to 28 U.S.C., Section 1257(2).

II.

The Clerk of the Supreme Court of Florida will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

	Date of Filing	*Kind of Instrument*
1.	January 11, 1960	Complaint
2.	March 9, 1960	Answer of Defendant
3.	March 16, 1960	Stipulation
4.	March 16, 1960	Memorandum Opinion of the Circuit Court in and for Orange County, Florida

[fol. 29]

	Date of Filing	*Kind of Instrument*
5.	March 16, 1960	Final Decree of Circuit Court in and for Orange County, Florida
6.	March 25, 1960	Notice of Appeal to the Supreme Court of Florida
7.	March 25, 1960	Assignments of Error to be relied upon in appeal to the Supreme Court of Florida
8.	November 16, 1960	Opinion of the Supreme Court of Florida
9.	November 24, 1960	Petition for Re-Hearing
10.	January 17, 1961	Order of the Supreme Court of Florida Denying Petition for Re-Hearing

III.

The following questions are presented by this appeal:

1. Whether F.S. 876.05 and 876.06, which require the Appellant, as a teacher and an employee of the Board of Public Instruction of Orange County, Florida, a body corporate, and "all persons who now or hereafter are employed by or who now or hereafter are on the payroll of the State", execute the following oath:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of .....; and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of

Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

are in violation of the Fourteenth Amendment to the Constitution of the United States, upon the grounds that they [fol. 30] deny to the Appellant, the due process of law, and the equal protection of the laws; and are further in violation of the Fourteenth Amendment to the Constitution of the United States, upon the ground that they deny to the Appellant freedom of speech, thought, and association; and are further in violation of Article 1, Section 10, of the Constitution of the United States, upon the ground that they constitute a Bill of Attainder and an Ex Post Facto law.

Tobias Simon, Attorney for Appellant, 706 Ainsley Building, Miami 32, Florida.

Certificate of Service (omitted in printing).

[fol. 31] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 32]

SUPREME COURT OF THE UNITED STATES

No. 849—October Term, 1960

DAVID WALTON CRAMP, JR., Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA.

ORDER POSTPONING JURISDICTION—May 29, 1961

Appeal from the Supreme Court of the State of Florida.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 196~~0~~1

No. ~~840~~ 72

DAVID WALTON CRAMP, JR.,

Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,

Appellee.

JURISDICTIONAL STATEMENT

On Appeal from the Supreme Court of the State of Florida

TOBIAS SIMON
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IN THE

Supreme Court of the United States

October Term, 1960

No. ————

DAVID WALTON CRAMP, JR.,

Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,

Appellee.

JURISDICTIONAL STATEMENT

On Appeal from the Supreme Court of the State of Florida

Appellant appeals from the judgment of the Supreme Court of the State of Florida entered November 16, 1960, and respectfully submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida (the Trial Court), issued a Memorandum Opinion and a Final Decree which are not reported. They are set forth hereinafter as Appendix "A" and "B", respectively.

The Opinion of the Supreme Court of the State of Florida is reported in 125 So.2d 554, the Official Reporter for the Supreme Court of the State of Florida. It is set forth hereinafter as Appendix "C".

JURISDICTION

These proceedings began with an action in the Circuit Court of Orange County, Florida, for declaratory relief against the Board of Public Instruction of Orange County, Florida (under provisions of Florida Statute 87.01) to determine the rights and status of the Appellant, a public school teacher, under the provisions of Florida Statutes 876.05 and 876.06, which require the execution of an expurgatory or loyalty oath as a condition precedent to continuing employment, and which said oath the Appellant failed to execute; and seeking a restraining order against dismissal.

The Circuit Court entered its Memorandum Opinion on March 16, 1960, holding that "F.S. 876.05 et seq. is constitutional and is mandatory as a condition precedent for public employment" and "the prayer for a permanent injunction in all respects should be denied."

Notice of Appeal to the Supreme Court of Florida was filed March 23, 1960. On November 16, 1960, the judgment of the Supreme Court of Florida was entered affirming the Circuit Court. Petition for Rehearing was denied without opinion.

Jurisdiction of this appeal is conferred upon the Supreme Court of the United States by Title 28, United States Code, Section 1257(2). Cases sustaining the juris-

diction are **Atchison T. & S.F. Ry. Co. v. Public U. Commission** (1953), 346 U.S. 346, 74 S.Ct. 92; **Standard Oil Co. of California v. Johnson** (1942), 316 U.S. 481, 62 S.Ct. 1168; **Gerende v. Board of Supervisors**, 341 U.S. 56, 71 S.Ct. 565; and **Wieman v. Updegraff**, 344 U.S. 183, 73 S.Ct. 215.

STATUTES INVOLVED

The validity of the following statutes of the State of Florida is involved:

F.S. 876.05:

> "All persons who are now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office are hereby required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:
>
> > "'I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member

of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.'

"And said oath shall be filed with the records of the governing official or employing governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation."

F.S. 876.06:

"If any person required by §§ 876.05-876.10 to take the oath herein provided or fails to execute same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll, and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving."

QUESTION PRESENTED

Whether Florida Statutes 876.05 and 876.06, which require the Appellant, as a teacher and an employee of the Board of Public Instruction of Orange County, Florida, to

execute the oath therein contained are in violation of the Fourteenth Amendment to the Constitution of the United States, upon the grounds that there is denied to the Appellant due process of law, and equal protection of the laws; and are further in violation of the First and Fourteenth Amendments to the Constitution of the United States, upon the ground that there is denied to the Appellan freedom of speech, thought, and association; and are further in violation of Article I, Section 10, of the Constitution of the United States, upon the ground that they constitute a Bill of Attainder and an Ex Post Facto Law.

STATEMENT

The Appellant, DAVID WALTON CRAMP, JR., is a teacher in the public school system in Orange County, Florida, and is an employee of the Appellee, the BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA. He had been such for approximately nine (9) years next prior to the bringing of the action. DAVID WALTON CRAMP, JR. was requested by the Principal of the school where he taught to correct an oversight on the part of the BOARD OF PUBLIC INSTRUCTION in failing theretofore to require that he execute the oath required by Section 876.05, Florida Statutes.

Appellant refused to execute the oath on his expressed statement that the statutory requirement of the execution of such an oath as a condition precedent to his continuing employment as a public school teacher was in violation of his rights as guaranteed by the Constitutions of the State of Florida and of the United States.

Appellant then brought his action for declaratory relief in the Circuit Court of Orange County, Florida, alleging the invalidity of the statutes involved under the Constitutions of the State of Florida and the United States. He asserted that he was a loyal American and did not decline to execute or subscribe to the required oath for fear of any penalties imposed by law for a false oath, but on the contrary that he does and will support the Constitution of the United States and of the State of Florida; he is not a member of the Communist Party; that he has not, does not and will not lend aid, support, advice, counsel or influence to the Communist party; he does not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; he is not a member of any organization or party which believes in or teaches directly or indirectly the overthrow of the Government of the United States or of Florida by force or violence.

Nevertheless, both the Circuit Court and the Supreme Court of Florida have upheld the validity of the statutes involved and their requirement of the execution of the oath therein contained as a condition of continuing employment. CRAMP's contract of employment was not renewed by the BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. THE FLORIDA STATUTE PRESCRIBES AN EXPURGATORY OR LOYALTY OATH AS A CONDITION PRECEDENT TO EMPLOYMENT OF PUBLIC SCHOOL

TEACHERS IN VIOLATION OF DUE PROCESS OF LAW.

Statutes imposing the requirement of a loyalty or expurgatory oath as a condition precedent to public employment, Government benefit or license, enacted shortly after the Civil War and relating to the political problems that beset that era, were stricken by the Supreme Court of the United States on the grounds that they were Ex Post Facto Laws and Bills of Attainder, **Cummings v. Missouri (1867 U.S.) 4 Wall. 277, 18 L. ed. 356, Ex parte Garland (1867 U.S.) 4 Wall. 333, 18 L. ed. 366.**

In recent years statutes imposing the requirement of loyalty oaths of similar type and relating to political problems of this age, again as conditions precedent to public employment and related occupations, have to some extent been upheld by the Supreme Court of the United States.

Thus in **Gerende v. Board of Supervisors,** 341 U.S. 56, 71 S.Ct. 565, the Maryland statute which denied a place on the ballot for municipal election in the City of Baltimore to one who did not subscribe to a required oath was declared to be valid.

Further in **Garner v. Board of Public Works,** 341 U.S. 716, 95 L. ed. 1317, 71 S.Ct. 909 (1951) the Court upheld the statute requiring the execution of loyalty oaths by those seeking public employment in the City of Los Angeles; and in **American Communications Association v. Douds,** 339 U.S. 382, 94 L. ed. 925, 70 S.Ct. 674 (1950) sustained the exaction of loyalty oaths from officers of labor unions.

In each instance the rationale was protection "from an evil shown to be grave (of) some interest clearly within the sphere of Government concern," (**Speiser v. Randall,** 357 U.S. 513, 2 L. ed. 2d 1460, 78 S.Ct. 1332) and it is clear that no blanket approval has been given to the exaction of loyalty oaths as a condition of public employment or benefit.

In **Speiser v. Randall,** (supra), and **First Unitarian Church v. Los Angeles,** 357 U.S. 545, 2 L. ed. 2d 1484, 78 S.Ct. 1350 the Court in striking down the oaths therein required has left open the question as to whether or not a loyalty oath can be made a condition of a tax exemption where the oath would **conclusively** establish the taxpayer's eligibility therefor.

The Supreme Court of the United States has never reached the question of whether or not a loyalty oath may be exacted from public school teachers. The required oath in **Wieman v. Updegraff,** 344 U.S. 183, 97 L. ed. 216, 73 S.Ct. 215, was stricken on the ground that it failed to include the element of **scienter;** and the Court did not reach the Constitutional question herein involved.

It is conceded that a teacher has been discharged for refusing to answer questions propounded by his superintendent during an investigation based on information reflecting adversely to the loyalty of the teacher and where the questions pertained to the fitness of the teacher in his field of endeavor, **Beilan v. Board of Education of Philadelphia,** 357 U.S. 399, 2 L.Ed 2d 1414, 78 S.Ct. 1317.

However, the requirement that a teacher respond in a question and answer investigation based on questions

relevant to competency and presumably begun because of information leading to a belief in his disloyalty is different and can be distinguished from the requirement of the execution of a loyalty oath. The refusal to sign a loyalty oath may be the equivalent of refusing to answer a question in the affirmative, "not the equivalent of refusing to answer. For example, if a public employee could be dismissed for refusing to sign an oath that he is not a Communist he would be forced to face dismissal even if he were an 'innocent' Communist, although such a charge could not otherwise have been the basis for his dimissal. In the question-answer situation, however, to escape this charge he could merely answer in the affirmative and subsequent dismissal proceedings would not be successful if he were in fact an 'innocent' Communist." **The Supreme Court, 1957 Term**, 72 Harvard L.R. 77, 190.

Besides, once a specific investigation has been begun, the interrogator-superior may be entitled to complete candor and forthrightness, at least where an investigation is in good faith and all questions are pertinent to competency. This too is distinguishable from a general requirement imposed on all personnel, whether suspect or not, to execute an oath of loyalty.

The circumstances which have sustained the requirement of the execution of loyalty oaths for candidates for public office, for labor union officers and for municipal employees do not exist so as to sustain the requirement in the case of school teachers. In the former cases, there exists an evil from which the oaths tend to protect the public (in theory at least—in practice, what Communist would desist from taking the oath?) In the case of teachers, however, the requirement of the oath increases an

existing evil, namely, it emphasizes the need for conformity rather than independence of thought and so tends to make a mockery of academic freedom and the principles and the guarantees of freedom of speech, thought and association as guaranteed to all persons by the First Amendment to the Constitution of the United States.

The relationship between the teacher and society and the attendant effects thereon of a required expurgatory or loyalty oath was well stated by Justice Frankfurter in his concurring opinion in **Wieman, supra**;

> "It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their association by potential teachers . . .
>
> "To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the

> meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State Government."

It is submitted that the requirement of a loyalty oath as a condition precedent to continuing employment for a public school teacher bears no reasonable relationship to the qualifications for that position; in fact, just the opposite is true—by the mere act of the execution of a loyalty oath an affiant pledges himself to so fetter his mind that he thereby takes a large step in destroying his own qualifications as a teacher. "The fitness of a teacher for her job turns on her devotion to that priesthood, her education, and her performance in the library, in the laboratory, and the classroom, not on her political beliefs," Justice Black dissenting in **Lerner v. Casey** at 357 U.S. 415, 2 L. ed. 2d 1436.

It is further submitted that the required execution of a loyalty oath subverts the presumption of innocence and alters the rules of evidence. It is assumed that the affiant is guilty and he is called upon to establish his innocence, and this innocence can only be shown in one way and that is in the form of an expurgatory oath.

As Mr. Justice Douglas said in his concurring opinion in **Speiser, supra,** at 2 L.Ed.2d 1477,

"The State by the device of a loyalty oath places the burden of proving loyalty on the citizen. That procedural device goes against the grain of our constiutional system, for every man is presumed innocent until guilt is established."

II. THE FLORIDA STATUTE PRESCRIBES AN OATH AS A CONDITION PRECEDENT TO EMPLOYMENT AS A PUBLIC SCHOOL TEACHER WHICH IS COMPLETELY RETROSPECTIVE IN THAT IT REQUIRES THE COMPLETE ABSENCE OF CERTAIN ACTIVITIES FOR AN UNLIMITED PAST PERIOD, WHEREBY THE SAID STATUTE VIOLATES THE PROHIBITIONS AGAINST EX POST FACTO LAWS AND BILLS OF ATTAINDER.

Where statutes requiring the execution of loyalty oaths have been upheld, there has not only been a putative relationship between the oath and the class of people required to execute it, but also there has been a reasonable relationship between the objectives and prohibitions of the oath and the required qualifications for the position of public employment or public benefit.

A public employee has rights and unconstitutional conditions cannot be imposed upon continuing employment, **Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216; American Communications Association v. Douds, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1950).** Neither a statute may prohibit, nor an oath prevent, a Negro, Jew or Catholic from public employment. An oath cannot be made a vehicle of discrimination or of punishment.

In no case since the post-Civil War period has this Court been confronted with a completely retrospective oath such as this whose provisions leave no room for mistake or penitence. After the Civil War, a number of States passed legislation requiring the execution of loyalty oaths as a pre-requisite of public employment and the practice of other professions. The general tenor of these statutes was that the affiants had never adhered to the Confederacy or had been disloyal to the United States. The test was past loyalty; present loyalty was immaterial.

In the leading cases of **Cummings v. Missouri**, (1867 U.S.) 4 Wall 277, 18 L.Ed. 356 and **Ex Parte Garland**, (1867 U.S.) 4 Wall 333, 18 L.Ed. 366 these oath requirements were stricken as Bills of Attainder and Ex Post Facto Laws prohibited by Article 1, Section 10 of the Constitution primarily because the unrelenting retrospective features were deemed punishments rather than regulations.

In **American Communications Association v. Douds**, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1950) the Supreme Court of the United States in upholding the loyalty oath therein prescribed made particular note of the lack of retrospective requirement and stated:

> "This distinction is emphasized by the fact that members of those groups identified in §9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted

a bar to signing the affidavit in the past. Past conduct, actual or threatened, by their previous adherence to affiliations and beliefs mentioned in §9(h) is not a bar to resumption of the position. In the cases relied upon by the unions, on the other hand, this Court has emphasized that since the basis of disqualification was past action or loyalty nothing that those persons prescribed by its terms could ever do would change the result. (See United States v. Lovett, Ex parte Garland, Cummings v. Missouri). Here the intention is to forestall future dangerous acts. There is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder."

The oath required in **Gerende** (supra) made present loyalty pre-requisite to appearing on the ballot. There was no requirement whatsoever of complete past loyalty to the United States.

In **Garner v. Board of Public Works**, 341 U.S. 716, 95 L.Ed. 1317, 71 S.Ct. 909 (1951) the 1941 Charter of the City of Los Angeles provided that no person could hold office who, within five years prior to the act, advised or advocated the Government's overthrow by violence. However, the effectuating ordinance was not passed for seven years thereafter, in 1948. Even though limited to a five-year retrospective provision, this Court said:

> "The ordinance would be ex post facto if it imposed punishment for past conduct lawful at the time it was engaged in. Passing for the moment the question whether separation of petitioners from their enployment must be considered as punishment, the ordinance clearly is not ex post facto. The activity covered by the oath had been proscribed by the charter in the same terms, for the same purpose, and to the same effect over seven years before, and two years prior to the period embraced in the oath. Not the law, but the fact was posterior."

Only the Florida law now before this Court seeks to impose a completely retrospective oath upon affiant as a condition for continuing employment, thereby seeking to enforce an Ex Post Facto Law and Bill of Attainder and thus succumbing to the Constitutional prohibitions against same.

III. THE FLORIDA STATUTE PRESCRIBES AN OATH WHICH REQUIRES A COMPLETE DISAVOWAL OF CERTAIN BELIEFS AS A CONDITION PRECEDENT TO EMPLOYMENT AS A PUBLIC SCHOOL TEACHER WHEREBY THE STATUTE VIOLATES THE FIRST AMENDMENT GUARANTEES OF FREEDOM OF SPEECH, THOUGHT AND ASSOCIATION.

The Florida Statutes require the non-existence of certain beliefs as a condition precedent to continuing employment as a public school teacher. This is clearly thought control. It is not overt action, merely, that it

prohibited; it is belief and opinion. If permitted to prohibit the employment of teachers on the basis of what they believe, cannot Florida next prohibit employment of teachers on the basis of their unsatisfactory opinions or beliefs on integration in the classroom? This is as clear a violation of the First Amendment to the Constitution of the United States as has ever been enacted.

In **American Communications Association v. Douds**, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1950), and **Osman v. Douds**, 339 U.S. 846, 94 L.Ed. 1328, 70 S.Ct. 901, this Court had under consideration a similar loyalty oath wherein the Affiant was obliged to swear that "he does not believe in and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

This provision was sustained in each case by an equally divided court, but only because the affirmatively favoring Justices construed the statute so as to avoid the danger of unconstitutionality and held that the clause in question only applied to those who "believe in violent overthrow of the Government as it presently exists under the Constitution **as an objective**, not merely **a prophecy**." (Emphasis added)

The Supreme Court of Florida did not so construe the Florida statutes. Despite reliance of counsel in their brief for Appellant upon the foregoing decisions, as also upon **Yates v. United States**, 354 U.S. 298, 1 L. ed. 2d 1356, 77 S.Ct. 1064 as to the distinction between "advocacy of abstract doctrine" and "advocacy directed at promoting unlawful action" in urging the Supreme Court of Florida

to define the terms used by the statute, the Supreme Court of Florida failed and refused so to do. The result of this inaction is to gloss over the distinction, thereby setting it at naught whereby the statute falls for unconstitutional proscription of rights guaranteed by the First Amendment to the Constitution of the United States.

CONCLUSION

We believe that the questions here presented are substantial and of great public importance and warrant plenary consideration by this Court.

Respectfully submitted,

TOBIAS SIMON
Attorney for Appellant
706 Ainsley Bldg.
Miami, Florida

CERTIFICATE OF MAILING

I, TOBIAS SIMON, Attorney for Appellant and a member of the Bar of the Supreme Court of the United States, hereby certify that on March , 1961, I served copies of the foregoing Jurisdictional Statement on the Appellee, THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, by mailing a Copy thereof in a duly addressed envelope with postage prepaid to the office of J. R. WELLS, ESQ., c/o Maguire, Voorhis & Wells, 135 Wall Street, Orlando, Florida, and by further mailing a copy thereof to the Honorable RICHARD ERVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

TOBIAS SIMON
Attorney for Appellant
706 Ainsley Building
Miami 32, Florida

APPENDIX A

IN THE CIRCUIT COURT OF THE 9th JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA. IN CHANCERY.

No. 38699

DAVID WALTON CRAMP, JR.,

Plaintiff,

vs.

THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, a body corporate,

Defendant.

MEMORANDUM OPINION

The pertinent question raised by the pleadings on bill and answer is whether the requirements of F.S. 876.05 et seq. as a condition precedent for the payment of public funds to a state employee violates the State and Federal Constitutions.

Although plaintiff by his sworn complaint, has in effect, plainly shown that he may, if he so desires, execute the required oath without fear of the penalties required by the law for a false oath, nevertheless he complains that the Act requiring the execution of a loyalty oath as a condition for public employment is a violation of due

process. The Florida Supreme Court, in State vs. Diez, 97 So.2d, 105 held:

> "In fine, we think the loyalty oath may be required without interfering with the Federal Government's operations against sedition; *we think the pertinent law does not offend against the Constitution;* we think the Act was intended to have a retrospective effect;" (emphasis supplied).

The State of Florida, acting through its duly elected representatives has the inherent right, through statutory law, to impose reasonable conditions precedent for public employment. Under the provisions of the challenged Act an employee of the State has his freedom of association as well as freedom of speech and the privilege of advocating ideas secured to him by the First Amendment to the Constitution of the United States so long as he can conscientiously execute the oath required by law. If he cannot do so he has the freedom of seeking employment elsewhere. The State has the right to preserve its integrity by requiring its employees, as one of the prerequisite conditions of employment, to subscribe to the loyalty oath. This is an inherent right secured to the body politic and under such circumstances the freedoms secured to the individual employee by the Constitution become subservient.

Plaintiff contends that the oath required by F.S. 876.05 is unconstitutional by reason of the failure to contain the elements of wilfulness and scienter. This contention was answered by the Florida Supreme Court in State vs. Diez, 97 So.2d, 105:

> "This conclusion does not lead to a decision declaring the Act unconstitutional because we think it is inherent in the law that when one takes the oath that he has not lent aid, advice, counsel and the like to the communist party, he is representing under oath that he has not done so knowingly."

It therefore follows that F.S. 876.05 et seq. is constitutional and is mandatory as a condition precedent for public employment.

Since the defendant has denied the allegations in Paragraph 11 of the Complaint such allegations may not be considered as being proven on bill and answer. Therefore the prayer for a permanent injunction in all respects should be denied for the reason stated herein.

Dated at Orlando, Florida, March 16, 1960.

/s/ ROGER A. BARKER
Circuit Judge

APPENDIX B

FINAL DECREE

This cause having been set down by plaintiff for hearing on bill and answer, and the parties having stipulated that the parties might, on or before Monday, March 14, 1960, submit to the Court for its consideration copies of any briefs used before the Supreme Court of Florida by the parties or by the amicus curiae on this litigation as well as any other memorandum briefs or copies of decisions that the parties might wish to submit, and that the Court might thereupon dispose of the case without a formal oral argument and without other or further notice, and the Court having examined and studied the pleadings herein together with copies of briefs used before the Supreme Court of Florida and other memorandum briefs and decisions as aforesaid submitted to the Court for its consideration as aforesaid, and the Court after due consideration being fully advised in the premises and being of the opinion that plaintiff is entitled to a determination regarding the constitutionality and validity as to him of Sections 876.05 and 876.06, Florida Statutes, and the Court having concluded from its study that said Sections 876.05 and 876.06, Florida Statutes, are constitutional and valid as to plaintiff for the reasons stated in its memorandum opinion filed herein,

IT IS ORDERED, ADJUDGED AND DECREED that said Sections 876.05 and 876.06, Florida Statutes, are hereby declared, determined and adjudged to be constitutional and valid as to plaintiff and not subject in any re-

spect to the attacks made on same by plaintiff in his complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff's prayer for a permanent injunction be and the same is hereby denied in all respects.

DONE AND ORDERED at Orlando, Florida, this 16th day of March, A. D. 1960.

/s/ ROGER A. BARKER
Circuit Judge

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1960

CASE NO. 30,598

DAVID WALTON CRAMP, JR.,

Appellant,

vs.

THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,

Appellee.

THORNAL, J.

Appellant Cramp who was plaintiff below seeks reversal of a final decree sustaining the validity of Sections 876.05-876.06, Florida Statutes.

We must decide whether the cited statute, which prescribes a so-called "loyalty oath" as a condition to public employment, offends various provisions of the State and Federal Constitutions.

Plaintiff Cramp had served approximately nine years in the public school system of Orange County. It was then discovered that through an oversight, he had never been required to execute the oath required by Section 876.05, Florida Statutes. The appellee Board immediately demanded that the oath be executed. The school teacher-appellant refused. He based his refusal on the contention that the statutory requirement of the execution of the oath as a condition to continuing his employment as a

public school teacher violated certain constitutional rights. Fearing dismissal he filed his complaint for a declaratory decree. He sought a temporary injunction against dismissal pending the litigation, and an ultimate decree adjudicating the invalidity of the statute. The chancellor denied the temporary restraining order. Cramp v. Board of Public Instruction, Fla., 118 So. 2d 541. On final hearing the chancellor upheld the statute against appellant's assault. The prayer for a permanent injunction was denied. By direct appeal, Article V, Section 4, (2), Florida Constitution, we are requested to reverse the final decree.

Appellant Cramp contends here, as he did in the trial court, that the subject statute is fatally vulnerable on various constitutional grounds. In sum, it is his position that the Florida loyalty oath statute is defective because it fails to specify knowledge or scienter as an element of the proscribed conduct. Appellant also contends that the statute destroys the traditional presumption of innocence and shifts the burden of proof by legislative enactment without due process; it is claimed that the statute is a bill of attainder and an ex post facto law and that it is so vague that it is unintelligible. Cramp claims that the Federal government has pre-empted the field of sedition control. Finally, he says that the Florida constitutional oath prescribed by Article XVI, Section 2, is exclusive and, therefore, does not permit any additional legislative prescription.

The appellee School Board by its brief undertakes to defend the statute against each of the attacks leveled by the appellant.

By Section 876.05, Florida Statutes, all persons em-

ployed by the State or any county or city, or school board, are required to subscribe to the following oath:

> "I, _____ a citizen of the State of Florida and of the United States of America, and being employed by or an officer of_____ and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

It is required that the oath be filed with the employing governmental agency prior to the approval of any salary voucher. Section 876.06, Florida Statutes, provides for the discharge of any person who refuses to subscribe to the quoted oath.

Sections 876.05-876.06, supra, were Sections 1 and 2, Chapter 25046, Laws of Florida, 1949. We have concluded that the chancellor ruled correctly in upholding the statute against the appellant's attack.

With as much brevity as the importance of the ques-

tion permits we shall proceed to dispose of each of appellant's contentions.

It is asserted that the prescribed oath does not include an element that the maker thereof had knowledge of the subversive nature of the affiliations at the time he engaged in them. In other words, appellant contends that a man should not be held liable for a false oath if he swears to non-subversive associations when in effect, he is or has been innocently and unknowingly aligned with a subversive organization. We think this matter has been placed at rest by us as well as by the Supreme Court of the United States. In State v. Diez, Fla., 97 So. 2d 105, we held that the element of scienter was implicit in each of the requirements of the statute. Conceding the essentiality of this element, we there upheld the statute with our interpretation to the effect that implied in each requirement was the presence of scienter or knowledge. Although appellant avers that this constitutes "a judicial amendment of the statute" we find ourselves supported in such an interpretation by respectable authority. Lerner v. Casey, 357 U.S. 468; Adler v. Board of Education, 342 U.S. 485, 27 A.L.R. 2d 472; Garner v. Board of Public Works, 341 U.S. 716; Gerende v. Board of Supervisors 341 U.S. 56.

We are not disturbed by appellant's reliance on Wieman v. Updegraff, 344 U.S. 183. While this decision involved a similar loyalty oath, the highest court of the State of Oklahoma had held that the element of scienter was not essential to validity and also that it was absent from the requirements of the act. The Supreme Court of the United States merely accepted the Oklahoma court's interpretation of its State statute as to the implication

of scienter. The United States Court reversed when it held that scienter was essential. On the other hand, the implication of scienter was sustained in those decisions which we have cited to support our view.

We think the time is now passed when statutes of this type are subject to question because of alleged preemption of the field of subversive control by the Federal Government. Appellant presses his claim in this regard with continued reliance on Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497. In sustaining this same statute against the same attack in Diez v. State, supra, we indicated our view that Nelson did not preclude paralleling state action on the same problem. We specifically so held in Gibson v. Florida Legislative Investigation Committee, Fla. 1959, 108 So. 2d 729, cer. den. 360 U.S. 919. The Supreme Court of the United States similarly announced its own position on the same subject in Uphaus v. Wyman, 360 U.S. 72. Moreover, we could actually lay aside this contention on the further ground that the instant statute legitimately prescribes an element of required qualifications precedent to public employment. The statute under discussion is merely a legislative enactment asserted within the orbit of the state's police power. It simply stipulates certain conditions under which individuals can work for the State. The subversive control aspect is involved only tangentially. The primary objective of the statute is to exclude from public employment persons lacking in the stipulated qualifications or in converse, persons burdened with stipulated disqualifying qualities. Beilan v. Board of Public Education, 357 U.S. 399; Adler v. Board of Education, 342 U.S. 485, 27 A.L.R. 2d 472; Lerner v. Casey, 357 U.S. 468; Thorp v. Board of Trustees, 6 N.J. 498, 79 A. 2d 462; Nostrand v. Balmer, Wash., 335

P. 2d 10, but see Nostrand v. Little, 362 U.S. 474; Laba v. Newark Board of Education 23 N.J. 364, 129 A. 2d 273; Appeal of Albert, 372 Pa. 13, 92 A. 2d 663; Fitzgerald v. City of Philadelphia, 376 Pa. 379, 102 A. 2d 887; Kaplan v. School District of Philadelphia, 388 Pa. 213, 130 A. 2d 672; State ex rel Schweitzer v. Turner, 155 Fla. 270, 19 So. 2d 832.

Appellant contends further that the oath prescribed by Section 876.05, supra, is unconstitutional for the reason that it imposes requirements additional to those stated in the constitutional oath prescribed by Article XVI, Section 2, Florida Constitution. To this end we are requested to follow the decision of the Supreme Court of New Jersey in Imbrie v. Marsh, 3 N.J. 578, 71 A. 2d 352, 18 A.L.R. 2d 241. Were we inclined to concur in the decision of the New Jersey Supreme Court on this point and we interpolate that we are not, we are here led by the facts of the instant case to distinguish the situation before us from that presented in the New Jersey matter. It was there held that a loyalty oath in addition to the stipulated constitutional oath similar to ours, could not be imposed upon candidates for the office of governor or members of the Legislature. We do not have a state officer involved here. The Florida Constitution requires that the oath be taken by "each and every officer of this State, . . . " The appellant Cramp is a school teacher and therefore, an employee as distinguished from an officer in the constitutional sense. State ex rel Holloway v. Sheats, 78 Fla. 583, 83 So. 508; IX U. Fla. L.R. 47, (Spring 1956). The constitutional oath prescribed by Article XVI, Section 2, supra, must be taken by all state officers but is not a stipulated requirement of an employee. New Jersey itself has made the distinction. Thorp v. Board of

Trustees, 6 N.J. 498, 79 A. 2d 462. Hence, appellant is not in a class adversely affected by the statutory requirement on this point, and is therefore not in a position to gain support from this argument.

In practically all the cases decided by the Supreme Court of the United States on the subject of loyalty oaths as a condition to public employment attacks have been directed on the ground of alleged vagueness, on the contention that freedom of speech and assembly are impinged and that the presumption of innocence is destroyed. In each instance dealing with similar statutes and similar situations the United States Supreme Court has consistently upheld the statutes against such assaults. Certainly the instant statute is perfectly clear in its requirements. There could be no doubt in the minds of anyone who can read English as to the requirements of the statute and the effect of a failure to comply. Adler v. Board of Education, supra.

It has long been recognized that the First Amendment freedoms are not absolutes in and of themselves. When they are asserted as a barrier to government action we are confronted by the necessity of balancing the asserted private right against the alleged public interest. The private right will certainly not be lightly regarded. However, an indirect adverse effect on the asserted right of the individual will not preclude the exercise of governmental power when the power is shown to exist and its assertion is necessitated by the exigencies of the public wellbeing. Barenblatt v. United States, 360 U.S. 109.

As we have pointed out in other parts of this opinion, the failure to take the required oath does not

work an adjudication of guilt nor does it burden the employee with the responsibility of providing innocence against an assertion of guilt. Statutes of this type have been consistenly sustained on the theory that they constitute merely a stipulation of qualifications or disqualifications for public employment. The statute contains no prohibition against the right of a citizen to speak out or to assemble peaceably. It merely provides that when one speaks out to advocate the violent overthrow of the government of the United States, or assembles for that purpose, he cannot simultaneously work for and draw compensation from the government he seeks to overthrow.

Finally we proceed to what is probably the most difficult aspect of the instant statute. So far as we have been able to ascertain, Florida is the only state which requires the employee to swear " . . . that I have not lend [lent] my aid, support, advice, counsel or influence to the Communist Party; . . ." Others might have similar provisions but we have been referred to none. This particular provision was upheld in Diez v. State, supra. In that opinion also, we construed the word "lend" as meaning "lent" when applied to the oath regarding past conduct. We are again fronted by the contention that the Florida Statute constitutes a bill of attainder prohibited to the states by Article 1, Section 10, Constitution of the United States. This is so, asserts the appellant, because when the employee is required by law to take an oath that he has not at any time in the past aided or supported the Communist Party, or else suffer the pain of dismissal, the Legislature is adjudicating his guilt without benefit of trial and an opportunity to defend. Appellant refers to the recognized definition of a bill of attainder as a

legislative enactment which adjudicates guilt without benefit of judicial trial. He points further to the prohibition against ex post facto laws which precludes giving retroactive effect to past conduct in order to support present punishment. Article I, Section 10, supra. For reasons we hereafter mention, the Supreme Court of the United States has upheld similar statutes against similar assaults. We must confess recognition of the necessity to subordinate our own conclusions to those of the higher authority on the subjject. However, we find it in most instances a little difficult to reconcile the recent decisions of the United States Court with its earlier precedents in Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356 and ex parte Garland, 4 Wall. 333, 18 L. Ed. 366. Moreover, the opinion of this Court in McNealy v. Gregory, 13 Fla. 417, clearly committed Florida to the ruling of the Cummings decision.

In recent years, however, the Supreme Court of the United States has, with almost invariable consistency, construed Cummings and Garland as involving a situation in which there was no reasonable relationship between the past conduct proscribed and the then current business or profession from which it was sought to exclude an individual solely account of his past conduct. In other words, the United States Court has merely held that there was no reasonable relationship between the profession of the Catholic Priest in Cummings, or that of the lawyer in Garland and the proscribed past conduct of having had affiliations with the then defeated Confederacy. This Court has likewise so construed Cummings and Garland. Page v. Watson, 140 Fla. 536, 192 So. 205; Diez v. State, supra. As stated above, this position is supported by numerous recent decisions of the Supreme Court of the

United States. Hawker v. New York, 170 U.S. 189; Garner v. Board of Public Works, 341 U.S. 716; Adler v. Board of Education, 342 U.S. 485; Beilan v. Board of Public Education, 357 U.S. 399.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. ~~849~~.72

DAVID WALTON CRAMP, JR.,
Appellant,

VS.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

MOTION TO DISMISS.

J. R. WELLS,
135 Wall Street,
(P. O. Box 633),
Orlando, Florida,
Attorney for Appellee.

R. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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The Federal Questions Presented Are Not Substantial and in Part Were Not Timely or Properly Raised or Expressly Passed On by the Court Below

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2. The contention that requiring a public school teacher (who swears in this case that he has never lent his aid, support, advice, counsel or influence to the Communist Party) to file an oath to that effect with public school authorities is to require an unconstitutional "expurgatory" oath and is an unconstitutional ex post facto law and an unconstitutioal bill of attainder does not raise a substantial federal question 6

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 849.

DAVID WALTON CRAMP, JR.,
Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

MOTION OF APPELLEE TO DISMISS APPEAL.

Appellee Board of Public Instruction of Orange County, Florida, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal in the above entitled case on the grounds (a) that the appeal does not present a substantial federal question and (b) that in part the

federal questions sought to be raised were not timely or properly raised or expressly passed on by the court below.

There is attached hereto as an appendix, cited herein as "Appellee's App. ...," a copy of the complaint filed by Appellant, so that this Court may readily determine whether Appellant was entitled to have determined by the Florida Supreme Court certain particular contentions then or now argued by Appellant but not passed on by that Court.

QUESTIONS PRESENTED BY APPELLANT.

Appellant asserts the unconstitutionality of Sections 876.05 and 876.06, Florida Statutes, which require public employees to execute the following oath:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

Both in the Notice of Appeal and in the Jurisdictional Statement counsel for Appellant attacks the prescribed oath as a whole without always clearly pointing out the specific portion of the oath to which a particular attack

is directed. We believe that it will be difficult to determine the substantiality of particular attacks, or the sufficiency of the raising of the particular questions, without breaking the oath down into its various parts and keeping in mind the specific language that is the subject of the particular attack that is made. We accordingly rephrase what we understand to be the contentions that are here made by Appellant so as to direct the particular contentions to the specific portions of the prescribed oath to which the contentions appear to apply. Appellant's contentions, as we understand them, are as follows:

(a) That requiring a school teacher as a condition to public employment to execute an oath that "I am not a member of the Communist Party and I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of the State of Florida by force or violence" is a violation of due process of law;

(b) That requiring a public school teacher (who swears in this case that he has never lent his aid, support, advice, counsel or influence to the Communist Party) to file an oath to that effect with public school authorities is to require an unconstitutional "expurgatory" oath and is an unconstitutional *ex post facto* law and an unconstitutional bill of attainder; and

(c) That requiring a public school teacher as a condition to public employment to disavow belief in the overthrow of the Government of the United States or of the State of Florida by force or violence violates the First Amendment guarantees of freedom of speech, thought and association.

We will discuss in the order stated the substantiality of these questions attempted to be presented by Appel-

lant and in connection with questions (b) and (c) will also discuss whether such questions are in fact appropriately presented to this Court as questions which ought to be considered and decided by this Court.

1. The Contention That Requiring a School Teacher As a Condition to Public Employment to Execute an Oath That "I Am Not a Member of the Communist Party and I Am Not a Member of Any Organization or Party Which Believes in or Teaches, Directly or Indirectly, the Overthrow of the Government of the United States or of Florida by Force or Violence" Is a Violation of Due Process of Law Does Not Present a Substantial Federal Question.

If scienter were not implicit in the prescribed oath, we would, of course, have substantially the situation of *Wieman* v. *Updegraff*, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216, but prior to the time here relevant the Supreme Court of Florida in *State* v. *Diez*, 97 So.2d 105, had held that the element of scienter was implicit in each of the requirements of our statute and in the present case the Supreme Court of Florida reaffirmed the holding of the Diez case in this regard (Appellant's App. 9). This was, of course, in accord with *Garner* v. *Board of Public Works*, 341 U.S. 716, text 724, 71 S. Ct. 909, 95 L. Ed. 1317, text 1324, and other decisions of this Court cited by the Supreme Court of Florida in its opinion.

With the question of scienter out of the way, there is no substantial Federal question left open by the decisions of this Court so far as a requirement that a teacher swear that he is not a member of the Communist party or a member of an organization or party which believes in, or teaches, the overthrow of the Government by force or violence, is concerned. A part of the oath sustained in *American Communications Asso.* v. *Douds*, 339 U.S. 382, 70 S. Ct. 674,

94 L. Ed. 925, was a provision that the affiant "is not a member of the Communist Party" (See p. 386 of 339 U.S., p. 936 of 94 L. Ed.) and a part of the oath sustained in *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317, was a provision that affiant is not "now" a member of or affiliated with "any group society, association, organization or party which advises, advocates or teaches * * * the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California".

In *Pockman* v. *Leonard*, 345 U.S. 962, 73 S. Ct. 951, 97 L. Ed. 1381, this Court dismissed for the want of a substantial federal question an appeal seeking to review a decision of the Supreme Court of California in *Pockman* v. *Leonard*, 39 Cal. 2d 676, 249 P.2d 267, which sustained an oath prescribed by a statute that required each civil defense worker to swear that he did not belong to any organization that advocated overthrow of government by force or violence or other unlawful means.

In *Barenblatt* v. *United States*, 360 U.S. 109, text 128, 79 S. Ct. 1081, 3 L. Ed. 2d 1115, text 1130, this Court stated:

> "This Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. See Gerende v. Board of Supervisors of Elections, 341 U.S. 56, 95 L. Ed. 745, 71 S. Ct. 565; Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 95 L. Ed. 1317, 71 S. Ct. 909. See also Beilan v. Board of Public Education, 357 U.S. 399, 2 L. Ed. 2d 1414, 78 S. Ct. 1317, 1324; Lerner v. Casey, 357 U.S. 468, 2 L. Ed. 2d 1423, 78 S. Ct. 1311; Adler v. Board of Education, 342 U.S. 485, 96 L. Ed. 517, 72 S. Ct. 380, 27 A.L.R. 2d 472."

(The cases cited above in the Barenblatt case, of course, dealt not only with "those occupying or seeking public office" but with public employees as well.)

See also: *Pickus* v. *Board of Education*, 9 Ill. 2d 599, 138 N.E.2d 532; *Thorp* v. *Board of Trustees*, 6 N.J. 498, 79 A.2d 462 (Judgment vacated as moot in 342 U.S. 803, 73 S. Ct. 7, 96 L. Ed. 608); *Laba* v. *Newark Board of Education*, 23 N.J. 364, 129 A.2d 273; *Fitzgerald* v. *City of Philadelphia*, 376 Pa. 379, 102 A.2d 887.

2. The Contention That Requiring a Public School Teacher (Who Swears in This Case That He Has Never Lent His Aid, Support, Advice, Counsel or Influence to the Communist Party) to File an Oath to That Effect with Public School Authorities Is to Require an Unconstitutional "Expurgatory" Oath and Is an Unconstitutional Ex Post Facto Law and an Unconstitutional Bill of Attainder Does Not Raise a Substantial Federal Question.

We do not question that if we had in this case the situation of a public school teacher who had lent aid, support, advice, counsel or influence to the Communist Party twenty or thirty years before the passage of the act here in question but who swears that he is not now a member of the Communist Party or any organization or party which believes in or teaches the overthrow of the Government of the United States or of Florida by force or violence and will not lend his aid, support, advice, counsel or influence to the Communist Party in the future, we would have a substantial federal question as to whether such a teacher could be denied public employment; but we have here no such situation.

The situation in our case was set out in the opinion of the Florida Supreme Court (Appellant's App. 16) as follows:

> "By the allegations of his complaint, the appellant under oath affirmatively denied any present or past associations which would preclude him from executing the subject oath. He stated in his complaint '* * * that he has not, does not, and will not lend (sic) aid, support or advice (sic) counsel or influence to the Communist Party; * * *.' Further, the appellant disavows any belief in the violent overthrow of either the State or Federal government. He denies membership in any organization which believes in or teaches such conduct. The complaint alleges that appellant 'is a loyal American' and he states that he does not decline to execute the required oath because of fear of penalties for the making of a false oath."

Appellant's complaint was sworn to by him (see page 5 of Appellee's Appendix). The detailed allegations of paragraph 6 of the complaint which are summarized in the above excerpt from the Florida Supreme Court's opinion will be found at page 2 of Appellee's Appendix.

The Florida Supreme Court disposed of Appellant's bill of attainder and *ex post facto* contentions (Appellant's App. 17) as follows:

> "* * * there could not possibly be a legislative adjudication of guilt for the simple reason that the complaint on which appellant stands affirmatively points out that appellant has never been connected with any organization that could result in guilt. Furthermore, as to this appellant the statute could not constitute an ex post facto law for the obvious reason that appellant asserts that he has never in the past been connected with any association which could lead to current punishment. In short, because of the allegations of his own complaint the appellant teacher has unequivocally demonstrated that he has no standing to assault the subject statute on the grounds that it is a bill of attainder, or an ex post facto law."

Right on the face of things, we submit, there can be no question that the Florida Supreme Court was correct in its holding that the subject statute is not a bill of attainder or an *ex post facto law as to Appellant*; and in view of the well-established rule that one may not claim standing in this Court to vindicate the constitutional rights of some third party (*Tyler* v. *Judges of the Court of Registration*, 179 U.S. 405, 21 S. Ct. 206, 45 L. Ed. 252; *Liberty Warehouse Company* v. *Burley Tobacco Growers' Cooperative Marketing Association*, 276 U.S. 71, 48 S. Ct. 291, 72 L. Ed. 473), there would, of course, be here no occasion for this Court to determine whether under circumstances not before the Court the subject statute might conceivably be a bill of attainder or an *ex post facto* law as to some third party. The policy of "strict necessity" in disposing of constitutional issues has been many times announced by this Court. See: *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 67 S. Ct. 1409, 91 L. Ed. 1666.

A determination that the statute prescribing the clause of the oath we are now discussing could not be a bill of attainder or an *ex post facto* law as to Appellant would then leave the following as the only question still remaining with regard to such clause:

Where a public school teacher before he is discharged brings a suit for a declaratory decree asserting in his sworn complaint that he has never lent his aid, support, advice, counsel or influence to the Communist party, is he entitled to a declaratory decree adjudging to be unconstitutional as to him a statute requiring him as a condition to continued employment to file with the public school authorities an oath swearing to the same things that he has sworn to in such complaint?

We submit that such contention can scarcely rise to the level of a constitutional controversy. This Court has held that only those who are adversely affected by a statute can draw in question its constitutional validity in a declaratory judgment proceeding as in any other: *Alabama State Federal of Labor* v. *McAdory*, 325 U.S. 450, text 463, 65 S. Ct. 1384, 89 L. Ed. 1725, text 1736. This Court has said time and time again that a party insisting upon the invalidity of a statute, as violating any constitutional provision, must show some injury to him before the courts will listen to his complaints: *Coffman* v. *Breeze Corporation*, 323 U.S. 316, text 325, 65 S. Ct. 398, 89 L. Ed. 264, text 271; *Voeller* v. *Neilston Warehouse Co.*, 311 U.S. 531, 61 S. Ct. 376, 85 L. Ed. 323; *Peoples Banking Co.* v. *Sterling*, 300 U.S. 175, 57 S. Ct. 386, 81 L. Ed. 586; *Premier Pabst Co.* v. *Grosscup*, 298 U.S. 226, 56 S. Ct. 754, 80 L. Ed. 1155.

Not only has Appellant failed to show any injury to him by being required to file with the school authorities an oath swearing to the things that he swears to in the case itself but, if he is actually innocent of having lent aid, support, advice, counsel or influence to the Communist Party in the past, it is difficult to see how requiring him to file an oath to that effect could possibly violate his constitutional rights anyway. Such an "expurgatory" oath was sustained in *Garner* v. *Board of Public Works*, 341 U.S. 716, text 720-721, 71 S. Ct. 909, 95 L. Ed. 1317, text 1323. The discussion of the Garner and other cases in *Speiser* v. *Randall*, 357 U.S. 513, text 527-529, 78 S. Ct. 1332, 2 L. Ed. 2d 1460, text 1473-1475, serves to emphasize that there could be no possible constitutional objection to requiring Appellant here to reiterate before the public school officials what he had already sworn to in his complaint. As the Florida Supreme Court said (Appellant's App. 17):

> "It being clear from the allegations of his own complaint that he has never been affiliated with any proscribed association, we are not persuaded that the requirement that he so state under oath could adversely affect him."

We submit that Appellant clearly does not present as to this particular clause of the oath any substantial federal question that he is entitled to raise.

3. The Contention That the Florida Statute in Question Violates the First Amendment Guarantees of Freedom of Speech, Thought and Association in the Provision of Said Statute Requiring, As a Condition to Employment as a Public School Teacher, Disavowal of Belief in the Overthrow of the Government of the United States or of the State by Force or Violence, Not only Was Not Sufficiently Raised or Passed on by the State Court As to Require Decision but Would Not Raise a Substantial Federal Question If It Had Been Raised Before or Passed on by the State Court.

While counsel for Appellant in his Jurisdictional Statement (p. 15) refers to the Florida Statutes requiring the non-existence "of certain beliefs as a condition precedent to continuing employment as a public school teacher," he fails to call attention to just how limited the disavowal of beliefs that is required actually is. As a matter of fact the only disavowal of belief that the statute requires in the prescribed affidavit is that the person making the affidavit "does not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" (p. 4 of Jurisdictional Statement).

While counsel for Appellant in stating his third point in his Jurisdictional Statement (p. 15 of the Jurisdictional

Statement) contends that requiring a disavowal of belief violates the First Amendment guarantees not only of freedom of thought but of freedom of association and of freedom of speech as well, it is obvious on the face of things that freedom of association has no relevancy at all in determining the constitutionality of a required disavowal of a specified belief and freedom of speech has only an indirect relevance, if any at all.

We will refer later to the fact that the contention now made by Appellant that the required disavowal of belief violates constitutional guarantees of freedom of thought and of speech was nowhere made in Appellant's complaint nor was such point specifically passed on by either the trial court or the Supreme Court of Florida. If the contention had been specifically made in the courts below by Appellant and passed on by such courts that the required negation of belief violated the First Amendment guarantees of freedom of thought and of speech, such contention would not have presented a substantial federal question. Such a contention is no longer fairly open in view of *American Communications Asso.* v. *Douds,* 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925, considered with *Adler* v. *Board of Education,* 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517, and *Speiser* v. *Randall,* 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460. Counsel for Appellant says (p. 16) that the "belief" provision in Section 9 (h) of the Labor Management Relations Act was sustained "by an equally divided court" in *American Communications Asso.* v. *Douds,* 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925. That is true so far as the total provision is concerned but Mr. Justice Frankfurter by restricting his dissent to Part VII of the Court's opinion and his comments elsewhere in his dissenting opinion made it clear that he would have sustained an affidavit requirement that the person executing

the affidavit did not believe in the overthrow of the United States Government by force. Compare:

> "Justice Frankfurter in a separate opinion, concurring in part, agreed that Congress could validly require disavowal of actual membership in the Communist party or of active belief in the overthrow of the government by force, but felt that to the extent that the Section went beyond that it was invalid."
>
> Note, 11 Maryland Law Review, p. 343.

Counsel for Appellant says (pp. 16-17) that the Supreme Court of Florida did not construe the clause of the Florida statute in question (as to belief "in the overthrow of the Government of the United States or of Florida by force or violence") as meaning that the clause applied only to those who believed "in violent overthrow of the Government as it presently exists under the Constitution as an objective, not merely a prophecy" and that the Florida Supreme Court "failed and refused" to define the terms used by the statute. The Florida Supreme Court did not "refuse"* to define the terms used by the statute. It failed to define precisely what was meant by "does not believe in the overthrow of the Government * * * by force or violence" because there was no particular occasion to define the terms but there is no reason at all to assume that the clause means anything other than what it would appear on its face to mean, viz., that the person executing the affi-

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*There is, of course, nothing in the record to show that counsel for Appellant "urged" the Supreme Court of Florida "to define the terms used by the statute" (so far as belief in the overthrow of the Government is concerned) and if counsel were permitted to go outside the record in that regard (which we do not understand to be the case) we would definitely take issue with the intimation by counsel for Appellant that he did "urge" on the Supreme Court of Florida such a definition of terms as is intimated in his Jurisdictional Statement.

davit is not a person who believes in the violent overthrow of the Government as it presently exists under the Constitution. Compare: *American Communications Asso.* v. *Douds*, 339 U.S. 382, text 407, 70 S. Ct. 674, 94 L. Ed. 925, text 948; *Mountain Timber Company* v. *State of Washington*, 243 U.S. 219, text 246, 37 S. Ct. 260, 61 L. Ed. 685, text 700; *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd.*, 315 U.S. 740, text 746-747, 62 S. Ct. 820, 86 L. Ed. 1154, text 1163.

In the Court's opinion in *American Communications Asso.* v. *Douds*, 339 U.S. 382, text 408, 70 S. Ct. 674, 94 L. Ed. 925, text 949, the Court said that to attack the straw man of "thought control" is to ignore the fact that the sole effect of the statute upon one who believes in overthrow of the Government by force and violence—and does not deny his belief—is that he may be forced to relinquish his position as a union leader." This language with reference to a union leader may well be considered in connection with the language of the Court in *Adler* v. *Board of Education*, 342 U.S. 485, text 492-493, 72 S. Ct. 380, 96 L. Ed. 517, text 524, with regard to school teachers as follows:

> "It is first argued that the Feinberg Law and the rules promulgated thereunder constitute an abridgement of the freedom of speech and assembly of persons employed or seeking employment in the public schools of the State of New York.
>
> "It is clear that such persons have the r nder our law to assemble, speak, think and believ they will. American Communications Asso. C. I. O. v. Douds, 339 U.S. 382, 94 L. Ed. 925, 70 S. Ct. 674. It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U.S. 75, 91 L. Ed. 754, 67 S. Ct. 556. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose

to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the State of New York because first, of their advocacy of the overthrow of the government by force or violence, or secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose.

* * *

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."

Compare:

"Freedom from belief in force or violence as a justifiable weapon for the destruction of government is of the very essence of a teacher's qualifications. The apprehended danger is real and abiding. We have long had evidences of the pressure here of a godless ideology ruthlessly fostered by a foreign power which has for its aim the violent overthrow of government and free society. And one of its weapons is the debasement of teaching as a softening measure in the consummation of the subversive process. * * * A teacher who is bereft of the essential quality of loyalty and devotion to his government and the fundamentals of our democratic society is lacking in a basic qualification for teaching. The teacher is not obliged to take

the oath; but if he refuses to do so he is not entitled to teach. * * *

"There is of necessity a close association between belief in force and teaching which is intimately related to fitness. One may not divorce one's beliefs from one's teachings."

Thorp v. *Board of Trustees*, 6 N.J. 498, 79 A.2d 462, text 470 (Judgment vacated as moot in 342 U.S. 803, 73 S. Ct. 7, 96 L. Ed. 608).

The contention now made by Appellant that the requirement in the subject statute that Appellant negative his belief in the overthrow of the Government by force or violence violates the First Amendment guarantees of freedom of speech or of thought was not passed on by the Supreme Court of Florida (Appellant's App. 6-17) or specifically referred to in the Court's opinion. Reference to Appellant's complaint (Appellee's App. 1-5) will show that such contention was not specifically raised in the complaint nor was it mentioned as a specific contention in the Circuit Judge's opinion (Appellant's App. 1-3). (This particular clause of the prescribed oath was not referred to at all in the Circuit Judge's opinion nor was any reference at all made to "freedom of thought". The only reference to "freedom of speech" was made in such a way as not to indicate any connection between the reference and the particular clause of the oath we are now dealing with.)

It is the rule in Florida (*Henderson* v. *Antonacci*, 62 So.2d 5, text 8) as well as generally (16 C.J.S. 331-332) that courts should not voluntarily pass upon constitutional questions which are not raised by the pleadings. It is also the rule in Florida (*Smith* v. *Ervin*, 64 So.2d 166, text 171) and generally (16 C.J.S. 335-336; *Corn* v. *Fort*, 170 Tenn. 337, 95 S.W.2d 620, text 628) that one who challenges the

constitutionality of an act of the Legislature must point out to the court exactly how and in what manner his constitutional rights will surely be, or have been invaded or infringed.

Paragraph 8 of the complaint (Appellee's App. 2-4) is the paragraph which sets out Appellant's attack on the subject statute. Outside of the general charge at the end of the paragraph (Appellee's App. 3-4) that the requirement of the oath in its entirety deprives plaintiff of due process of law, the only allegation in paragraph 8 that could conceivably have anything to do with a contention that requiring Appellant to negative the specified belief violates the guaranteed freedom of thought and of speech is the first sentence (Appellee's App. 2) in which Appellant asserts that the requirement that he execute the oath as a condition precedent to his continuing employment by the defendant "is a violation of his rights as a free, loyal American citizen as guaranteed by the First and the Fourteenth Amendments to the Constitution of the United States". This allegation clearly is too general and vague to present the particular constitutional claim now made and lacks the requisite specificity: 16 C.J.S. 335-339; *State* v. *Flanigan*, 349 Mo. 54, 159 S.W.2d 598; *Jewel Tea Co.* v. *Rowe*, 414 Ill. 495, 111 N.E.2d 568; *Biggs* v. *Cummins*, 5 Ill. 2d 512, 126 N.E.2d 208, text 210; *Glover* v. *City of Rome*, 173 Ga. 239, 160 S.E. 249. See also: *Stembridge* v. *Georgia*, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130; *Thomas* v. *Iowa*, 209 U.S. 258, 28 S. Ct. 487, 52 L. Ed. 782.

The rule is, of course, well established in this Court that this Court will not on an appeal from a state court consider constitutional questions which have not been seasonably raised before or passed on by the state court: *Nelson* v. *County of Los Angeles*, 362 U.S. 1, text 9, 80 S. Ct. 527, 4 L. Ed. 2d 494, text 500; *Adler* v. *Board of Edu-*

cation, 342 U.S. 485, text 496, 72 S. Ct. 380, 96 L. Ed. 517, text 526; *Edelman* v. *California*, 344 U.S. 357, text 358, 73 S. Ct. 293, 97 L. Ed. 387, text 391; *Maxwell* v. *Newbold*, 18 How. 511, 15 L. Ed. 506; *Harding* v. *Illinois*, 196 U.S. 78, 25 S. Ct. 176, 49 L. Ed. 394.

It is respectfully submitted that the question of whether requiring Appellant to negative under oath his belief in the overthrow of the Government by force or violence was an unconstitutional violation of freedom of thought or freedom of speech guaranteed to him by the First Amendment (as incorporated into the Fourteenth Amendment) was not either raised in or passed on in the state courts and that, if such question had been suitably raised in or passed on in the state courts, it would not have presented a substantial federal question.

CONCLUSION.

In concluding, we submit the following:

1. The contention that requiring a school teacher as a condition to public employment to execute an oath that he is not a member of the Communist Party and is not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government by force or violence, is a violation of due process of law does not present a substantial federal question, where the element of scienter has been held by the state court to be implicit in the applicable statute.

2. The contention that requiring Appellant (a public school teacher who swears in this case that he has never lent his aid, support, advice, counsel or influence to the Communist Party) to file an oath to that effect with public school authorities is an unconstitutional *ex post facto* law

or an unconstitutional bill of attainder as to Appellant does not present a substantial federal question.

3. Appellant is not entitled to raise the question whether the applicable statute could be an unconstitutional *ex post facto* law or an unconstitutional bill of attainder as to persons and under circumstances not now before the Court.

4. The contention that requiring a public school teacher (who swears in his complaint in this case that he has never lent his aid, support, advice, counsel or influence to the Communist Party) to file an oath to that effect with public school authorities is to require an unconstitutional "expurgatory" oath does not present a substantial federal question.

5. Appellant has not appropriately raised (nor did the state courts pass on) Appellant's contention that the Florida statute in question violates the First Amendment guarantees of freedom of speech and freedom of thought in the provision of such statute requiring, as a condition to employment as a public school teacher, disavowal of belief in the overthrow of the Government of the United States or of the State by force or violence.

6. If Appellant had appropriately raised, or if the state courts had passed on, the question of whether the Florida statute in question violates the First Amendment guarantees of freedom of speech, thought and association in the provision of such statute requiring, as a condition to employment as a public school teacher, disavowal of belief in the overthrow of the Government by force or violence, the contention here made by Appellant in that regard would not have presented a substantial federal question.

It is respectfully submitted that this appeal does not present in any particular a substantial federal question and, further, in part the federal questions sought to be raised were not timely or properly raised or expressly passed on by the court below.

Respectfully submitted,

J. R. WELLS,
135 Wall Street,
(P. O. Box 633),
Orlando, Florida,
Attorney for Appellee.

CERTIFICATE OF MAILING.

I, J. R. WELLS, Attorney for Appellee and a member of the Bar of the Supreme Court of the United States, hereby certify that on April ....., 1961, I served a copy of the foregoing Motion to Dismiss on the Appellant, DAVID WALTON CRAMP, JR., by mailing a copy thereof in a duly addressed envelope with postage prepaid to the office of TOBIAS SIMON, 706 Ainsley Building, Miami 32, Florida, and I further served a copy on the Attorney General of the State of Florida by mailing a copy thereof in a duly addressed envelope with postage prepaid to the Honorable RICHARD ERVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

J. R. WELLS,
135 Wall Street,
(P. O. Box 633),
Orlando, Florida,
Attorney for Appellee.

COMPLAINT.

(Formal parts omitted)

* * * * *

The plaintiff, by his undersigned attorneys, states:

1. The plaintiff is a resident of Orange County, Florida, and is over the age of twenty-one years.

2. The defendant is a body corporate created by the Legislature of the State of Florida, and is charged with the administration of the public schools located in Orange County, Florida.

3. The plaintiff has been employed by the defendant for nine years last past in the capacity as teacher, and is now employed in that capacity at William R. Boone High School, located in the City of Orlando, County of Orange and State of Florida.

4. The plaintiff has been requested by the principal of the said high school (one of the instructional personnel employed by the defendant) to subscribe to the following oath prescribed by F.S. §876.05 as follows:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of

the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.

5. Plaintiff has been advised that the execution of said oath is a statutory prerequisite to his continued employment by the defendant, and that upon his failure to subscribe to said oath, he can be immediately discharged and his name can be removed from the payroll of the defendant.

6. The plaintiff avers that he has, does and will support the Constitution of the United States and of the State of Florida; he is not a member of the Communist Party; that he has not, does not and will not lend, aid, support, advice, counsel or influence to the Communist party; he does not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; he is not a member of any organization or party which believes in or teaches directly or indirectly the overthrow of the Government of the United States or of Florida by force or violence.

7. The plaintiff is a loyal American and does not decline to execute or subscribe to the aforesaid oath for fear of the penalties provided by law for a false oath.

8. The plaintiff avers, however, that the requirement of the statutes of Florida and of the defendant that he execute the said oath as a condition precedent to his continuing employment by the defendant is a violation of his rights as a free, loyal American citizen as guaranteed by the First and the Fourteenth Amendments to the Constitution of the United States and Sections 12, 13 and 15 of the Declaration of Rights and Article 16, Section 2 of

the Constitution of the State of Florida. The said oath, insofar as it requires plaintiff to swear or affirm that he has not lent aid, support, advice, counsel or influence to the Communist Party is an ex post facto law, illegally retroactive, and deprives him of liberty and property in violation of due process of law guaranteed by the Fourteenth Amendment of the United States Constitution; that the aforesaid oath, insofar as it requires plaintiff to swear or affirm that he has not and will not lend aid, support, advice, counsel or influence to the Communist Party without the qualification that he has not *knowingly* and will not *knowingly* lend aid, support, advice, counsel or influence to the Communist Party, is arbitrary and capricious and deprives plaintiff of due process of law guaranteed by the Fourteenth Amendment; that the aforesaid oath, insofar as it requires plaintiff to swear or affirm that he is not a member of any organization or party which believes in or teaches, directly or indirectly, overthrow of the Government of the United States or of the State of Florida by force or violence without the qualification that he is not a member of any organization or party which to his knowledge so believes or teaches, is arbitrary and capricious and deprives plaintiff of due process of law guaranteed by the Fourteenth Amendment; that the aforesaid oath, insofar as it seeks to deprive plaintiff of his employment for failure to swear or affirm that he is not a member of the Communist Party and has not lent his aid, support, advice, counsel or influence to the Communist Party and is not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of the State of Florida by force or violence, is a bill of attainder and unconstitutional under Art. I, §9 of the United States Constitution; and that the requirement of

the oath in its entirety deprives plaintiff of freedom of association and due process of law guaranteed by the First and Fourteenth Amendments of the United States Constitution.

9. For the reasons above set forth, the plaintiff declines to execute or subscribe to the oath as set forth in F.S. 876.05.

10. The plaintiff fears that the defendant will discharge or attempt to discharge him from its employ as a consequence of his declining to execute or subscribe to the said oath.

11. The action of the defendant in discharging or attempting to discharge the plaintiff from its employ would constitute irreparable damage, harm and injury to the plaintiff in that he would be unable to work as a teacher, the work for which he has been trained and in which he has specialized for approximately ten years last past.

12. The plaintiff is in doubt as to his rights and obligations with regard to the defendant as the same are affected by a statute whose validity and constitutionality is questioned by the plaintiff, and the plaintiff desires a declaration of his rights and status thereunder.

WHEREFORE and by reason of the foregoing, the plaintiff prays that this Honorable Court take jurisdiction of the within cause and determine the validity of F.S. 876.05 et seq., insofar as the same is applicable to the plaintiff, if at all, and to construe the plaintiff's rights and obligations thereunder as an employee of the defendant, and pending such determination to temporarily enjoin the defendant from discharging or attempting to discharge the plaintiff from its employ, and upon a final determination of the rights, obligations and status of the

plaintiff under the provisions of F.S. 876.05 et seq. to permanently enjoin the defendant from requiring that the plaintiff execute the oath required by F.S. 876.05 and to permanently enjoin the defendant from discharging the plaintiff for his failure to execute the said oath.

TOBIAS SIMON AND HOWARD W. DIXON
Attorneys for Plaintiff
706 Ainsley Building
Miami, Florida
By: /s/ TOBIAS SIMON

STATE OF FLORIDA)
) SS.
COUNTY OF ORANGE)

BEFORE ME, the undersigned authority, duly authorized to take oaths and acknowledgments, personally appeared DAVID WALTON CRAMP, JR., who being by me first duly sworn, deposed and said that he has read all of the allegations of the foregoing Complaint for Declaratory Relief and states that the same are true and complete.

/s/ DAVID WALTON CRAMP, JR.
DAVID WALTON CRAMP, JR.

SWORN TO AND SUBSCRIBED before me this 7th day of January, 1960.

/s/ Doris E. Page
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 72

DAVID WALTON CRAMP, JR.

Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA

Appellee.

Appeal From The Supreme Court of The State of Florida

BRIEF FOR APPELLANT

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No. 72

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Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA

Appellee.

Appeal From The Supreme Court of The State of Florida

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinions, judgments and orders of the Supreme Court of Florida, and the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, in this case are reported at 125 So.2d 554 in the first instance and are unreported in the second. They appear at R. 11-19; 20.

JURISDICTION

The Judgment of the Supreme Court of Florida was filed November 16, 1960; Petition for Rehearing denied January 17, 1961. Appeal to Supreme Court of the United States was thereafter filed pursuant to 28 U.S.C. 1257 (2). Order of Supreme Court of the United States postponing Jurisdiction entered May 29, 1961.

QUESTION PRESENTED

Whether F.S. 876.05 and 876.06, which require the Appellant, as a teacher and an employee of the Board of Public Instruction of Orange County, Florida, a body corporate, and "all persons who now or hereafter are employed by or who now or hereafter are on the payroll of the State", execute the following oath:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ....., and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow

> of the Government of the United States or of Florida by force or violence."

are in violation of the Fourteenth Amendment to the Constitution of the United States, upon the grounds that they deny to the Appellant, the due process of law, and the equal protection of the laws; and are further in violation of the Fourteenth Amendment to the Constitution of the United States, upon the grounds that they deny to the Appellant freedom of speech, thought and association; and are further in violation of Article I, Section 10, of the Constitution of the United States, upon the ground that they constitute a Bill of Attainder and an ex post facto law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10, of the Constitution of the United States provides:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

F.S. 876.05 provides:

"All persons who are now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:

'I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ....., and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.'

"And said oath shall be filed with the records of the governing official or employing governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation."

F.S. 876.06 providess:

"If any person required by § § 876.05-876.10 to take the oath herein provided for fails to execute the same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll, and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving."

STATEMENT OF THE CASE

David Walton Cramp, Jr., is a teacher in the public school system in Orange County, Florida, and is an employee of the Board of Public Instruction of Orange County, Florida. At the time of the institution of this litigation (January 11, 1960), he had been such for nine years.

F.S. 876.05 and F.S. 876.06 had been enacted as C.25046 Laws of Florida, 1949. Nevertheless, the Appellant had not been asked to comply therewith until shortly prior to the within litigation. At that time, he was requested by his principal to correct the omission, and to execute the oath required by F.S. 876.05. Appellant refused on the grounds that the statutory requirement of the execution of the oath as a condition precedent to his continuing employment as a public school teacher was in violation of his rights as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and pertinent provisions of the Florida Constitution.

Appellant instituted suit in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, for declaratory relief pursuant to F.S. 87.01 to ascertain whether the Act was constitutional and whether or not he had to sign the oath as a condition of his continuing employment. On March 16, 1960, the Circuit Court declared the statute valid and that Cramp had to sign the oath. The Supreme Court of Florida, on appeal, affirmed the Court below in its Opinion filed November 16, 1960. This appeal to the Supreme Court of the United States followed.

SUMMARY OF ARGUMENT

We subscribe to the proposition that a State may exclude from its employ knowing members of the Communist Party; or others advocating, as an objective, the violent and forcible overthrow of the Government.

This end does not justify any means of achieving it. The exclusionary process cannot make unconstitutional demands upon the State's personnel; they cannot be required to forego the Bill of Rights for the privilege of endorsing a paycheck. The requirement of the execution of the loyalty oath prescribed by the State of Florida is just such a demand. It is invalid for several reasons.

I

A loyalty oath creates resistance to free inquiry, association and speech. This is State action in direct contravention of First Amendment freedoms. Even though it is held that free speech and association can be subordinated to the public interest, where the need is great, such is demonstrably not the case at Bar. America's need for academic freedom for hundreds of thousands of teachers and professors far outbalances any danger—undemonstrated in this case—of subversion taking root in the classroom.

Moreover, the loyalty oath is an inconsequential aid in the ferreting out of disloyalty. Its purported benefits are hardly worth the achieving without any price; how much less at its unbelievable cost in liberty and principle.

The attack upon First Amendment freedoms by

loyalty oaths generally becomes a blitzkrieg in the case of the Florida oath. This oath contains the peculiar characteristic of being completely retrospective—barring from State employment any person who had ever been implicated in forbidden activity, thought or belief. As such, it bears no reasonable relationship to the State's need in securing fit and competent teaching personnel. It stands, completely transparent, as a device solely to punish for past speech and association.

The State has other methods to secure fit and competent teaching staffs without destruction of First Amendment rights. Subversives can be excluded from its payroll in a manner that does no damage to our traditional concepts of burden of proof. Such alternatives are more efficacious; are consistent with due process of law; and their very existence pre-empts any claim the loyalty oath might assert for legitimacy and constitutionality.

II

The Statute prescribing the necessity for a loyalty oath further violates the constitutional prohibition against the Bill of Attainder and the ex post facto law. Florida's oath is completely retrospective. Thus, it seeks to punish for past conduct, thought and belief. A State that cannot find the room for a place of penitence is doing something other than prescribing qualifications for professions and vocations.

III

Florida's oath mounts its attack upon those who have at any time ever held certain beliefs. It is completely immaterial whether these beliefs were ever acted upon,

voiced or constituted an objective or a prophecy. Such a wide-sweeping prohibition is an open effort to monitor thought. No court in the United States has ever upheld such an ordinance.

IV

Florida's oath is so vague in its conditions and prohibitions that it denies due process of law.

ARGUMENT

I. THE REQUIRED EXECUTION OF THE LOYALTY OATH PRESCRIBED BY THE FLORIDA STATUTES AS A CONDITION OF STATE EMPLOYMENT IS A VIOLATION OF THE FREEDOMS OF SPEECH, ASSOCIATION AND BELIEF.

A State has the right to choose its own employees.

> "No unit of Government can be denied the right to keep out of its employ those who seek to overthrow the Government by force or violence, or are knowingly members of an organization engaged in such endeavor." (Frankfurter, J., concurring in part and dissenting in part in **Garner v. Board of Public Works**, 341 U.S.716, 725, 71 S.Ct. 909, 95 L.Ed. 1317, 1325.)

On the other hand, the State in exercising its power to hire employees of its own choosing has the responsibility not to utilize a constitutionally invalid system of exclusion.

> "The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by State-imposed criteria forbidden by the Constitution. This was settled in our holding in Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 219, 97 L.Ed. 216. We there pointed out that whether or not 'an abstract right to public employment exists,' Congress could not pass a law providing '. . . that no Federal employee shall attend Mass or take any part in missionary work'." **Torcaso v. Watkins,** ___ U.S. ___, 6 L.Ed.2d 982, 987, 81 S.Ct. 1680, 1684.

The prime barrier to State use of the loyalty oath is the Fourteenth Amendment and its incorporated freedoms of speech, association and belief. Despite any other purported achievement, the hallmark of the loyalty oath is that it compels disclosure of associations and beliefs. This is undeniably a restriction of these freedoms. **Speiser v. Randall,** 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332; **Konigsberg v. State Bar of California,** 362 U.S. 910, 6 L.Ed.2d 105, 81 S.Ct. 101.

As was stated by Justice Black, concurring in **Speiser v. Randall,** supra, at 2 L.Ed.2d 1460, 1476:

> "Loyalty oaths, as well as other contemporary 'security measures', tend to stifle all forms of unorthodox or unpopular thinking or expression—the kind of thought and expression which have played such a vital and beneficial role in the history of this Nation. The result is a stultifying

> conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be . . . I am certain that loyalty to the United States can never be secured by the endless proliferation of 'loyalty' oaths. . . "

To those to whom any State action deterring or restricting speech and association is in itself a violation of the Constitution ("The recognition that California has subjected 'speech and association to the deterrent of subsequent disclosure' is under the First Amendment sufficient in itself to render the action of the State unconstitutional . . . " Black, J., dissenting in **Konigsberg v. State Bar of California**, supra, at 6 L.Ed.2d 105, 122), the requirement of a loyalty oath as a condition of employment is ipso facto bad.

To those who regard First Amendment protections as being not absolute but as qualified by the demands of the State balanced (or pitted) against the rights of the individual, when the subordinating interests of the State predominate, the individual rights of speech, privacy and association must give way. **Watkins v. United States**, 354 U.S. 178, 1 L.Ed.2d 1273, 77 S.Ct. 1173; **National Association for the Advancement of Colored People v. Alabama**, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163.

Under this latter view, execution of loyalty oaths as a condition of employment or other Governmental benefit has been upheld as against the First and Fourteenth Amendment rights of municipal employees (**Garner v. Board of Public Works**, supra), candidates for public office (**Gerende v. Board of Supervisors**, 341 U.S. 56, 95

L.Ed. 745, 71 S.Ct. 565), and labor union officers (**American Communications Association v. Douds**, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674). In each of these cases, there was presumably an evil within the sphere of Governmental concern that had to be corrected; the use of a loyalty oath could correct it; and this combination outweighed and outbalanced the interests of the particular individuals which were admittedly invaded by the loyalty oath requirement.

However, the holdings in the foregoing cases are not to be enlarged so as to engulf this one. No matter that the personal liberties of municipal employees were regarded as expendable to some State need; the importance of unimpeded thought and the right of exploration for teachers unhampered by stifling loyalty oaths far exceeds that of any other profession or vocation. In **Sweezy v. New Hampshire**, 354 U.S. 234, 250, 1 L.Ed.2d 1311, 1324-1325, 77 S.Ct. 1203, this Court held:

> "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate."

In **Wieman v. Updegraff**, supra, Mr. Justice Frankfurter stated at 97 L.Ed. 216, 225:

> "To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for

> responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State Government."

Mr. Justice Frankfurter further stated therein, concerning the loyalty oath which the State of Oklahoma attempted to prescribe as a condition precedent to teachers' employment:

> "It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." (97 L.Ed. 216, 224)

Moreover, ours is not a case, as was the situation in **American Communications Association v. Douds**, supra, where the "discouragements" of the loyalty oath "touches

only a relative handful of persons". Here the requirement of the loyalty oath, if upheld, will have deleterious effects upon the liberties of tens of thousands of teachers in the State of Florida and hundreds of thousands striving for academic freedom throughout the United States.

Further, the Florida oath is different from those involved in **American Communications Association v. Douds, Gerende, Garner** (supra). The Florida oath requires disclosures into the unending past. This Court may have been willing to accept the swath cut across protected rights by an oath demanding disclosures of current associations; but it is a different matter to approve the devastation caused by an oath that demands complete information regarding all prior association, advocacy and belief.

Florida prohibits the employment of any person who was ever a knowing (**Diez v. State**, 97 So.2d 105) Communist, regardless of his then age, circumstance or his subsequent change of heart. (Interestingly, Florida does not bar from employment one who once believed in the overthrow of the Government but no longer does so.) There is no room in Florida for penitence or reflection. Having once danced around the golden calf, banishment is eternal. (**Diez v. State**, supra, **Cramp v. Board of Public Instruction**, supra). Yet, it was just because return to grace was permitted that a loyalty oath required of labor union officers was sustained in **American Communications Association v. Douds**, supra, (94 L.Ed. 925, at 952).

> "This distinction is emphasized by the fact that members of those groups identified in Section 9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past.

> Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in Section 9(h), is not a bar to resumption of the position. In the cases relied upon by the union on the other hand, this Court has emphasized that since the basis for disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. See United States v. Lovett . . . Cummings v. Missouri . . . Here the intention is to forestall future dangerous acts; there is no one who may not be a voluntary alternation of the loyalty which impel him to action become eligible to sign the affidavit."

In **Garner v. Board of Public Works**, supra, the California legislature in 1941 amended the Charter of the City of Los Angeles to provide that no person could hold office who, within five years prior to the Act, advocated the Government's overthrow by violence. However, the effectuating ordinance was not passed by the City of Los Angeles until 1948. Here, at worst, was but a five-year retrospective provision, as distinguished from the eternally retrospective portions of the Florida oath. Yet, the Court said:

> "The ordinance would be ex post facto if it imposed punishment for past conduct lawful at the time it was engaged in. Passing for the moment the question whether separation of petitioners from their employment must be considered as punishment, the ordinance is clearly not ex post facto. The activity covered by the oath had been proscribed by the Charter in the same terms, for the same purpose, and to the same effect over

seven years before, and two years prior to the period embraced in the oath." (95 L.Ed. 1317, at 1323)

In Gerende v. Board of Supervisors, supra, the Supreme Court of the United States upheld the Maryland law that required a candidate for public office execute an oath that "he is not a person who engaged in one way or another in the attempt to overthrow the Government by force or violence" (emphasis added). It is quite clear from the statement of the Supreme Court of the United States in Garner v. Board of Public Works, supra, that the exclusion from office was justified only on the grounds that the candidate "currently espoused" a program against the Government (95 L.Ed.1317, at 1330).

The State of Florida will say that it has a need for the execution of loyalty oaths; that its incursion into protected freedoms is justifiable in view of the State's need in securing fit and competent teaching personnel free of the taint of disloyalty and subversion.

Whatever the right of a State to secure fit and competent teachers, it is clear that the State has no need for the loyalty oath. The loyalty oath fulfills no legitimate State function. It is, at best, an inept tool. It has been stated, "The validity of an oath must be judged on the assumption that it will be taken conscientiously," Garner v. Board of Public Works, supra, 95 L.Ed. 1317, at 1326. Herein lies the fallacy. One dedicated to the overthrow of the Government by force and violence will hardly refrain from signing a false oath. Only persons of principle will be caught in the entanglements of reiterated oath taking. The State cannot advance its program of extirpating sub-

versives from its employment rolls by means of loyalty oaths. The system simply does not work.

Furthermore, where a State seeks associational ties extending back to the date of the birth of an adult teacher, it is rather apparent that it is no longer imposing qualifications for positions. It is doing nothing less than imposing punishment for past conduct, opinion and belief. This is not the type of ballast that will create a balance in favor of the State.

In **National Association for the Advancement of Colored People v. Alabama**, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163, the State of Alabama sought to secure the Association's membership list and gave as its reason that it was seeking to determine whether the Association was conducting intrastate business in violation of Alabama's corporation registration statute. The Court asked, "Whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members on their constitutionally protected right of association," 2 L.Ed.2d 1488, at 1500.

The Court held:

> "Whether there was 'justification' in this instance turns solely on the **substantiality** of Alabama's interest in obtaining the membership list." (Emphasis added) 2 L.Ed.2d 1488, at 1501.

In the case at Bar, the State has claimed a need for the disclosure but has demonstrated none. The method utilized by the State while destructive of liberty does not

advance the State's interest in securing fit and competent teachers in any manner at all.

Therefore, we submit that if the preservation of First Amendment rights are to depend upon their weight in any particular case as opposed in each instant to the need of the State, the balance must be struck in the case at Bar in favor of Appellant on behalf of all teachers throughout the United States.

Nevertheless, if the State's interests are paramount —here, in securing fit and competent teachers—the State still is not free to subjugate liberties if its desired ends can be alternatively achieved in a manner which leaves the people's freedoms alone. In **McGowan v. Maryland**, ... U.S. ....., 6 L.Ed.2d 393, 81 S.Ct. ....., this Court stated the foregoing principle in a case involving religious liberty; but the effect remains the same regardless of which First Amendment freedom is involved:

> "This is not to say that Governmental regulations which find support in their appropriateness to the achievement of secular, civil ends are invariably valid under the First or Fourteenth Amendments whatever their effects. . . If the value to the State of achieving the object of a particular r e g u l a t i o n is demonstrably outweighed by the impediment to which the regulation subject those whose religious practices are curtailed by it, **or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those religious practices, the regulation cannot be sustained.**" (Emphasis added)

Or, putting the matter only slightly differently, this Court said, in **Shelton v. Tucker,** ..... U.S. ....., 5 L.Ed.2d 231, 237, 81 S.Ct. 247, in a case involving academic freedom and liberty of association for teachers:

> "In a series of decisions this Court has held that, even though the Governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (5 L.Ed.2d 231, at 237)

Thus, those who adhere to the "balance theory" of First Amendment liberties, once they have found a subordinating State interest, must then use a second weighing scale. They must choose the best of possible alternatives. As between methods that can be used to exclude subversives from the teaching profession, that one must be chosen which has the least harmful effect upon, and which will be most likely to preserve, the teacher's rights and liberties.

In **Shelton v. Tucker,** supra, Arkansas required its teachers to file an affidavit listing every organization to which they had belonged or had regularly contributed during the preceding five-year period. The Supreme Court of the United States held:

> "The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehen-

> sive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." (5 L.Ed.2d 231, at 238)

The sweep of the Florida loyalty oath is an even more comprehensive interference with academic freedom and personal belief. In **Shelton**, the State was (in theory at least) only seeking information. This information could not be used to improperly discharge the teacher. As Mr. Justice Frankfurter said in dissent (5 L.Ed.2d 231, at Page 242):

> "Of course, if the information gathered by the required affidavits is used to further a scheme of terminating the employment of teachers solely because of their membership in unpopular organizations, that use will run afoul of the Fourteenth Amendment. It will be time enough, if such use is made, to hold the application of the statute unconstitutional. See Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220."

In the case at Bar, the time of "running afoul" has already arrived. The Florida loyalty oath requires one-time organizational membership to mean automatic and immediate discharge. It means that an ancient, short membership, in the Communist Party, no matter how speedily terminated, forever bars all possibility of pursuing State employment as a teacher. This, we submit, has no bearing on teacher competence, or on exclusion of subversives.

An alternative to the loyalty oath as a means of achieving the State's purported goals is an employer investigation. Where any basis exists for questioning the loyalty of a teacher—and teachers have not gone unnoticed during the past fifteen years of increasing conformity—he may be called in for questioning. This has become approved procedure in cases involving lawyers (**Konigsberg v. State Bar of California**, supra), teachers (**Beilan v. Board of Public Education**, 357 U.S. 399, 2 L.Ed. 2d 1414, 78 S.Ct. 1317), subway engineers (**Lerner v. Casey**, 357 U.S. 468, 2 L.Ed.2d 1423, 78 S.Ct. 1311), and county employees (**Nelson v. County of Los Angeles**, 362 U.S. 1, 4 L.Ed.2d 494, 80 S.Ct. 527).

This Court has imposed the requirement that frank and forthright answers must be forthcoming from the employee. Obviously, the State's interests are well protected; its burdens small.

Yet, whatever one may question concerning this procedure it represents a considerable advance over the blanket loyalty oath requirement. Some semblance of due process is maintained. Privacy may be assured. An opportunity is given to make explanations. Answers can be weighed. (It is just possible that one who was a Communist in the disillusioning 1930's could have changed his mind and have used the interim period to become an otherwise competent teacher.) Discharge need not be automatic. The burden of proof can be righted. (This last point is most important. As Mr. Justice Douglas said in **Speiser v. Randall**, supra:

> "The State by the device of the loyalty oath places the burden of proving loyalty on the citi-

zen. That procedural device goes against the grain of our constitutional system, for every man is presumed innocent until guilt is established. This technique is an ancient one that was denounced in an early period of our history.")

Of not the least importance is the fact that the State of Florida has for the first time adopted an Administrative Procedure Act which would apply to such an employer investigation in the case at Bar and for most other State employees (Chapter 61-280 Acts of Florida 1961; effective July 1, 1961). This Act guarantees a hearing and the requirements of due process of law.

II. THE FLORIDA STATUTE REQUIRING A LOYALTY OATH AS A CONDITION OF EMPLOYMENT IS A BILL OF ATTAINDER AND EX POST FACTO LAW.

The Statute requiring the execution of a loyalty oath as a condition precedent to public employment in the State of Florida is a Bill of Attainder and an ex post facto law in violation of Article I, Section 10, of the United States Constitution. The proof of this is to be found in the landmark decision of **Cummings v. Missouri** (U.S.), 4 Wall 277, 18 L.Ed. 356, wherein the Court held that a Catholic priest could not be required to sign the loyalty oath prescribed by the Missouri Constitution as a condition of saying mass. The Court stated:

"If the clauses of the Second Article of the Constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having

been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States and, therefore, should be deprived of the right to preach as a priest of the Catholic church, or to teach in any institution of learning, there could be no question that the clauses would constitute a Bill of Attainder within the meaning of the Federal Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the Federal Constitution.

"The results which would follow, from the clauses of the character mentioned, do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priest and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The

> deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law maker in the case would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows."

In **ex parte Garland** (U.S.), 4 Wall 333, 18 L.Ed. 366, the Supreme Court struck down the Congressional requirement that attorneys subscribe to an oath of loyalty to the United States as a precedent condition to their right to practice law. That court of the year 1866 stated:

> "The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be affected indirectly by a State under the form of creating qualifications we have held in the case of Cummings v. Missouri, and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress."

It is true that in **Garner**, supra, a majority of the Court upheld the requirement of a loyalty oath as a con-

dition of employment for municipal employees as against the contention that the same constituted a Bill of Attainder. However, that Court found that "punishment is a prerequisite" and found that there was no punishment because the Los Angeles Charter and ordinance declared **prospectively** operative standards of eligibility for public employment.

In **American Communications Association v. Douds,** supra, this Court sustained the statutory requirement of a loyalty oath as against the contention that it was a Bill of Attainder and stated that there was no punishment involved since the statute did not punish individuals concerned for past actions but subjected them only to possible loss because of **future conduct.**

In **DeVeau v. Braisted,** 363 U.S. 144, 4 L.Ed.2d 1109, 80 S.Ct. 1146, the Supreme Court upheld the constitutionality of Section 8 of the New York Waterfront Commission Act of 1953 denying certain rights to unions, any of whose officers or agents had been convicted of a felony. The court held that such an action was not invalid as a Bill of Attainder or ex post facto law stating:

> "Finally, Section 8 of the Waterfront Commission Act is neither a Bill of Attainder nor an ex post facto law. The distinguishing feature of the Bill of Attainder is the substitution of a legislative for a judicial determination of guilt. See United States v. Lovett, 328 U.S. 303, 90 L. Ed. 1252, 66 S.Ct. 1073. Clearly, Section 8 embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction; and so it manifestly is not a Bill of At-

> tainder. The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession. See Hawker v. New York (U.S.) supra. No doubt is justified regarding the legislative purpose of Section 8. The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony."

The Florida statute is devoid of measures which would permit it to escape being a Bill of Attainder or ex post facto law as in the last cited cases. The Florida statute does not operate prospectively only. It reaches into the past and punishes for past conduct since past conduct alone is ground for discharge. There can be no pretense that this is an effort to establish qualifications for teaching personnel. The Act does not permit a one hundred percent anti-Communist to teach if he had strayed off the straight and narrow path for even one moment in his youth. Such an individual could have spent the next twenty years in acquiring college degrees and in writing tracts on the dangers of Communism. Nevertheless, his bar to teaching in Florida would be as great

and impregnable as if he had been Khrushchev himself. Clearly, the Florida Act reaches the person and not the calling.

The Florida Act violates the prohibitions of the closely related ex post facto clause of the Constitution. By an ex post facto law

> " . . . is meant one which imposes a punishment for an act which is not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." **Cummings v. Missouri**, supra, at Page 364.

Thus, had a man been a Communist prior to 1949, when F.S. 876.05 was enacted, an act which at that time did not carry any punishment nor was it illegal, he would subsequently have been punished by being barred from the teaching profession as a consequence of his prior membership.

Sustaining the Florida loyalty oath will permit the punishment of any person at any time for any act which offends the wishes of the temporary majority. As was stated in **Cummings v. Missouri**, supra, at Page 365:

> "Suppose that, in the progress of events, persons now in the minority in the State should obtain the ascendancy, and secure the control of the Government; nothing could prevent, if the constitutional prohibition can be evaded, the enact-

ment of a provision requiring every person, as a condition of holding any position of honor or trust, or of pursuing any avocation in the State, to take an oath that he had never advocated or advised or supported the imposition of the present expurgatory oath. Under this form of legislation the most flagrant invasion of private rights, in periods of excitement, may be enacted; and individuals, and even whole classes, may be deprived of political and civil rights."

III. THE REQUIRED EXECUTION OF THE LOYALTY OATH PRESCRIBED BY THE FLORIDA STATUTES IS AN ATTEMPT TO CONTROL THOUGHT AND TO COMPEL CERTAIN BELIEFS IN VIOLATION OF THE FIRST AMENDMENT.

Florida bars from State employment not only those who **join** organizations but those who **believe** in certain forbidden ideas and concepts as well: "That I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" (F.S. 876.01).

A similar provision was found in the now repealed Section 9(h) of the Labor Management Relations Act, 29 U.S.C.A., Sections 141, 159(h). Admittedly, this provision was sustained against attack by a 3-3 decision in **American Communications Association v. Douds**, supra. Those voting to affirm, however, were obliged to incorporate a gloss upon the statute because "the breadth of the provision concerning belief in overthrow of the Government by force would raise additional questions, how-

ever, if it were read very literally to include all persons who might, under any conceivable circumstances, subscribe to that belief."

It was necessary, therefore, in the opinion of the court to modify the plain and clear language that purportedly proscribed mere belief.

> "The Congressional purpose is therefore served if we construe the clause, 'that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods', to apply to persons and organizations who believe in violent overthrow of the Government as it presently exists under the Constitution **as an objective, not merely a prophecy.**" (Emphasis added) 94 L.Ed. 925, 948.

On this point, the decision of the court was succinctly stated:

> "We hold, therefore, that the belief identified in Section 9(h) is a belief in the **objective** of overthrow by force or by any illegal or unconstitutional methods of the Government of the United States as it now exists under the Constitution and the laws thereof." (Emphasis added) 94 L.Ed. 925, 948-949.

In **Speiser v. Randall**, supra, California required veterans to execute the following oath as a condition of obtaining certain tax exemptions:

> "I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities."

The Supreme Court of the United States struck down the required oath on the ground that the statutory procedure placed the burden of proof and persuasion of non-engagement in the proscribed advocacy on the taxpayer. However, the "advocacy" that California sought to prohibit was defined as something more than the word itself might otherwise suggest. As was stated in a footnote to the opinion:

> "The California Supreme Court construed these provisions as inapplicable to mere belief. On oral argument counsel for the taxing authorities further conceded that the provisions would not apply in the case of advocacy of mere 'abstract doctrine'. See Yates v. United States, 354 U.S. 298, 312-327, 1 L.Ed.2d 1356, 1371-1379, 77 S.Ct. 1064."

The Supreme Court of the United States clearly indicated that an attempt to proscribe abstract doctrine or mere belief must fail; and that dictating beliefs as a condition of Governmental benefit (and presumably a job) must fail.

The Florida oath proscribes mere belief and makes mere belief a ground of exclusion from the teaching profession. This is thought control; Florida seeks to become

the Big Brother to its employees. Nowhere in the opinion of the Supreme Court of Florida (125 So.2d 554) is any restriction placed upon the meaning of the word "believe" and its wide unfettered scope remains; as such, it serves as another reason to defeat the requirement of the oath as a condition of employment.

In **Torcaso v. Watkins,** U.S. , 6 L.Ed.2d 982, 81 S.Ct. 1680, the Supreme Court of the United States held that a State cannot compel a belief in the existence of God as a test for office in the State of Maryland.

Let it be said that neither can the State of Florida compel a belief of any type for the privilege of being a teacher in the Orange County schools.

IV. THE PROVISIONS OF THE FLORIDA OATH ARE SO VAGUE AND UNCERTAIN AS TO DENY DUE PROCESS OF LAW

Certain of the offending portions of the Florida oath are at least clear and unambiguous. One knows, for example, whether or not one is a "member of the Communist Party" (F.S. 876.05).

It is another matter, however, to be required to swear that one has not lent "aid, support, advice, counsel or influence" to that organization.

One may or may not know whether he believes "in the overthrow of the Government of the United States or of the State of Florida by force or violence," but how can one be required to swear that he is "not a member

of any organization or party which believes in or teaches directly or indirectly, the overthrow of the Government . . . by force or violence".

The authors of this brief have not lent "aid, support, advice, counsel or influence" to the Communist Party. Yet, innumerable citizens are quite content to feel to the contrary, solely by reason of our representation of the Appellant in this case. There are many in some geographic locations who espouse the doctrine that supporters of public school integration are giving support to the Communist Party; while United States Government officials have publicly stated that those resisting integration are aiding the forces of Communism.

Aiding or resisting Communism are concepts blurred by emotion in today's world. Very often the difference lies only in whether the other fellow agrees with you or not. Those intent upon dragooning advocates of social reform into the pro-Communist camp have not been limited to the ignorant; but have included Judges, prosecutors and legislators, and candidates for all these offices. At least this is true in Florida, and we doubt the situation is better elsewhere.

What is sometimes sought to be done to individuals is more freely attempted for organizations, possibly since the latter do not have the dubious advantage of the libel laws. Categorization of organizations began several years ago, and has since found its way into Executive orders and Congressional enactments. Conceivably, one could wend one's way through Communist organizations, and Communist front organizations and Communist-infiltrated organizations. 50 U.S.C.A. 782.

However, to be required to ascertain whether any other organization "indirectly" follows the Communist line, is to surrender completely to hopeless confusion.

By reason of the uncertainty of the scope of the clauses of the Florida oath, one who executes it, is placed at the mercy of unsympathetic Judges and juries. There may not be much hesitancy in reaching a verdict that someone who is unpopular is also subversive and therefore a perjurer. Nor, as Justice Frankfurter said in **American Communications v. Douds, supra, 94 L.Ed. at 955,**

> "It does not meet the difficulty to suggest that the hazard of a prosecution for perjury is not great since the convictions for perjury must be founded on willful falsity. To suggest that a Judge might not be justified in allowing a case to go to a jury, or that a jury would not be justified in convicting, or that, on the possible happening of these events, an appellate court would be compelled to reverse, or, finally, that resort could be had to this Court for review on a petition for certiorari, affords safeguards too tenuous to neutralize the danger."

The plight of organizations was adroitly noted by Mr. Justice Stewart in **Shelton v. Tucker**, supra, where he noted,

> "In the State court proceedings a witness who was a member of the Capital Citizens Council testified that his group intended to gain access to some of the Act 10 affidavits with a view

> to eliminating from the school system persons who supported organizations unpopular with the group. Among such organizations he named the American Civil Liberties Union, the Urban League, the American Association of University Professors, and the Women's Emergency Committee to Open Our Schools."

It is a small step to add other "out" groups. The effort to adjudge them "indirect" proponents of Communism might be unnoticeable.

In **American Communications Association v. Douds**, supra, Justice Frankfurter dissented from the majority upholding the validity of a loyalty oath, on the ground that the statute prescribing it was void for uncertainty. Compared to the Florida oath the provisions of 29 U.S. C.A. 159(h) therein involved were stark rigid and positive both in outline and detail. Yet it was stated: (94 L.Ed. 955)

> "In my view Congress has cast its net too indiscriminately in some of the provisions of Section 9 (h)" and "ask(s) assurances from men regarding matters that open the door too wide to mere speculation or uncertainty . . . If a man has scruples about taking an oath because of uncertainty as to whether it encompasses some beliefs that are inviolate, the surrender of abstention is invited by the ambiguity of the congression exaction . . .
>
> ". . . I cannot deem it within the rightful authority of Congress to probe into opinions that involve only an argumentative demonstra-

tion of some coincidental parallelism of belief with some of the beliefs of those who direct the policy of the Communist Party, though without any allegiance to it. To require oaths as to matters that open up such possibilities invades the inner life of men whose compassionate thought or doctrinaire hopes may be as far removed from any dangerous kinship with the Communist creed as were those of the founders of the present orthodox political parties in this country." (94 L.Ed. 956)

V. CONCLUSION

It is respectfully submitted that the Florida Statutes should be stricken as invalid and un-constitutional. Execution of a loyalty oath cannot be made a condition of the right to teach. Elimination of the oath requirement will in no way interfere with the State's goal of obtaining fit and competent teachers; nor will it prevent the imposition of honest and legitimate qualifications for a teacher's license; nor will it mean that the State is prohibited from excluding subversiveness from its employ.

Basically, the oath is neither designed nor fitted to achieve any of these. Its only function is to punish for past conduct, affiliation or belief in no way connected with present qualification or ability as a teacher.

While the State's purposes may be more easily and better accomplished in other ways, the removal of the oath requirement will remove a great weight from First Amendment freedoms of expression, association and belief.

Perhaps a non-judicial expression best seems to illustrate the true place of loyalty oaths in a free society. Governor Alfred E. Smith, in signing bills repealing the New York Lusk Laws of 1921, said of the loyalty commitments that had been required of teachers,

> "They are repugnant to the fundamentals of American democracy. Under the laws repealed, teachers, in order to exercise their honorable calling, were in effect compelled to hold opinions as to Governmental matters deemed by a State officer consistent with loyalty; and, further, no private school could be maintained in this State unless its teachings were similarly satisfactory to certain officials of the State. Freedom of opinion and freedom of speech were by these laws unduly shackled, and an unjust discrimination was made against the members of a great profession." O'Brian, **Loyalty Tests and Guilt by Association**, 61 Harvard L.R. 592, 595-596 (1948).

Respectfully submitted

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CERTIFICATE OF MAILING

I, TOBIAS SIMON, Attorney for Appellant and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 24, 1961, I served copies of the foregoing Brief for Appellant on the Appellee, THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, by mailing a copy thereof in a duly addressed envelope with postage prepaid to the office of J. R. WELLS, ESQ., c/o Maguire, Voorhis & Wells, 135 Wall Street, Orlando, Florida, and further mailing a copy thereof to the Honorable RICHARD ERVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 72.

DAVID WALTON CRAMP, JR.,
Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

QUESTIONS PRESENTED BY APPELLANT.

Appellant asserts the unconstitutionality of Sections 876.05 and 876.06, Florida Statutes, which require public employees to execute the following oath:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of .....

> and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches directly or indirectly the overthrow of the Government of the United States or of Florida by force or violence."

Both in the Notice of Appeal and Jurisdictional Statement and in Appellant's Brief, counsel for Appellant attacks the prescribed oath as a whole without always clearly pointing out the specific portion of the oath to which a particular attack is directed. We believe that it will be difficult to determine the strength of particular attacks, or the sufficiency of the raising of the particular questions, without breaking the oath down into its various parts and keeping in mind the specific language that is the subject of the particular attack that is made. We accordingly rephrase what we understand to be the contentions that are here made by Appellant so as to direct the particular contentions to the specific portions of the prescribed oath to which the contentions appear to apply. Appellant's contentions, as we understand them, are as follows:

(a) That requiring a school teacher as a condition to public employment to execute an oath that "I am not a member of the Communist Party and I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of the State of Florida by force or violence" is a violation of due process of law;

(b) That requiring a public school teacher (who swears in this case that he has never lent his aid, support, advice, counsel or influence to the Communist Party) to file an oath to that effect with public school authorities is to require an unconstitutional "expurgatory" oath and is an unconstitutional *ex post facto* law and an unconstitutional bill of attainder; and

(c) That requiring a public school teacher as a condition to public employment to disavow belief in the overthrow of the Government of the United States or of the State of Florida by force or violence violates the First Amendment guarantees of freedom of thought and belief.

There is a further contention of Appellant that is, at least in part, encompassed within some of the above three questions but which since it is directed to all three of the portions of oath above referred to, we will discuss separately; and that is the question of vagueness. The fourth question then is:

Is a state statute unconstitutionally vague (in violation of the Fourteenth Amendment) that requires a school teacher as a condition to public employment to execute an oath including the following:

(1) "I have not * * * lend (lent) my aid, support, advice, counsel or influence to the Communist Party";

(2) "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence";

(3) "I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence".

STATEMENT OF THE CASE.

Appellant's Statement of the Case is substantially correct. However, we note the following omissions or inaccuracies:

1. Appellee's failure to ask Appellant to execute the required oath during the period he was employed in the Orange County school system prior to 1960 was due to an oversight. The situation was set out in the Florida Supreme Court opinion as follows:

> "Plaintiff Cramp had served approximately nine years in the public school system of Orange County. It was then discovered that through an oversight, he had never been required to execute the oath required by Section 876.05, Florida Statutes. The Appellee Board immediately demanded that the oath be executed." (R. 11).

2. In Appellant's Complaint in this case he in fact swore to the very things that he says in the Complaint he cannot constitutionally be required to swear to (R. 2, 4).

3. While the Circuit Court determined Sections 876.05 and 876.06, Florida Statutes, to be constitutional and valid as to Appellant and not subject in any respect to the attacks made on same by Appellant in his Complaint, such Circuit Court did not determine, at least in so many words, "that Cramp had to sign the oath" (R. 9) as asserted in Appellant's Brief (Br. 6).

SUMMARY OF ARGUMENT.

Appellant's Brief is a broadside directed against loyalty oaths in general. As already remarked, it is impossible to weigh the strength of any particular attack without break-

ing the oath here in question into its component parts and analyzing the particular attack in the light of the actual language against which such particular attack is directed.

When the oath here in question is thus broken down (and when it is considered that under the Florida cases scienter is implied in each provision of the statute), it is readily apparent that the only provison in the oath still fairly open to question is the provision that affiant shall swear that he has not lent his aid, support, advice, counsel or influence to the Communist Party which apparently relates to the remote past as well as the immediate past. It is our position that the statute is constitutional and valid even as to one who, in the remote past only, knowingly lent aid, support, advice, counsel or influence to the Communist Party; but this contention is a subordinate one. Our primary contention is that Appellant is not in position to raise the question; that he swears he never lent aid, support, advice, counsel or influence to the Communist Party and the statute cannot possibly be unconstitutional as to him. He is not in position to have determined in this proceeding the validity of the statute so far as it affects someone else not a party to this proceeding.

Aside from the retrospective feature of the required oath, the provision of the oath which can most plausibly be contended as being still open to question is the provision that affiant does not "believe in the overthrow of the Government of the United States or of the State of Florida by force or violence". This question, for reasons stated in the body of our argument, we do not believe is in fact open at the present time. If it is open, however, we take the position that reason and logic support the position that no constitutional rights of a school teacher are violated by being required to swear that he does not believe in the overthrow of the Government of the United States or of

the State of Florida by force or violence. It is also our position that this question was not sufficiently raised in or passed on by either of the State Courts as to require decision.

JURISDICTION OF THIS COURT.

On May 29, 1961, this Court entered an order postponing consideration of the question of jurisdiction to the hearing of the case on the merits (R. 23).

Our motion to dismiss was based on the grounds (a) that the appeal does not present a substantial Federal question and (b) that in part the Federal questions sought to be raised were not timely or properly raised or expressly passed on by the court below.

The three clauses of the required oath to which the questions presented by Appellant are directed are the following: (1) "I am not a member of the Communist Party; * * * I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or Florida by force or violence", (2) "I have not * * * lend (lent) my aid, support, advice, counsel or influence to the Communist Party", and (3) "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence". In addition to questions presented by Appellant directed to the three clauses separately he presents the question of unconstitutional vagueness as to all three clauses.

It is our position that the attack made on the basis of vagueness does not present a substantial question.

It is our position that the attack made on clause (1) does not present a substantial question.

As to the primary attack made on clause (2), while we recognize that a substantial question would be presented if it were raised by a person in position to raise it, it is our position that Appellant is not in position to raise the question. There are several subordinate questions raised by Appellant as to clause (2). As to these subordinate questions it is our position that they are are not substantial questions and further that Appellant is not in position to raise them.

With regard to clause (3) it is our position both that the question sought to be presented is not a substantial one and also that the question was not raised in or passed on by either the Supreme Court of Florida whose judgment is under review or by the trial court in Florida whose decree was affirmed by the Supreme Court of Florida.

The questions of jurisdiction will be argued in connection with the argument of the questions on the merits.

ARGUMENT.

1. The Contention That Requiring a School Teacher As a Condition to Public Employment to Execute an Oath That "I Am Not a Member of the Communist Party and I Am Not a Member of Any Organization or Party Which Believes in or Teaches, Directly or Indirectly, the Overthrow of the Government of the United States or of Florida by Force or Violence" Is a Violation of Due Process of Law Does Not Present a Substantial Federal Question.

If scienter were not implicit in the prescribed oath, our Florida statute would, of course, have to be declared unconstitutional on the same basis that the Oklahoma statute

was declared unconstitutional in *Wieman* v. *Updegraff*,[1] 344 U.S. 183, 73 S. Ct. 215, 97 L. ed. 216; but in 1957 (long prior to the time here relevant), the Supreme Court of Florida in *State* v. *Diez*, 97 So.2d 105, citing the Garner case hereinafter referred to and other cases decided by this Court, had held that the element of scienter was implicit in our statute, and in the present case the Supreme Court of Florida reaffirmed the holding of the Diez case in this regard (R. 13-14).

In *Garner* v. *Board of Pub. Works*, 341 U.S. 716, text 724, 71 S. Ct. 909, 95 L. ed. 1317, text 1324, this Court said with regard to the oath there involved:

> "We assume that scienter is implicit in each clause of the oath."

In *State* v. *Diez*, 97 So.2d 105, the Florida Supreme Court, while holding that the informations before it were defective in that, if all material allegations of the informations were proved by the state, the defendant could be convicted of perjury regardless of lack of knowledge on his part when he had at some time or other subscribed in some way or other to some movement or other that was later found to be communistic in design or purpose, continued:

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1. In the Supreme Court of Florida's opinion in our case the Court referred to *Wieman* v. *Updegraff* as involving "a similar loyalty oath" (R. 14) and in our Motion to Dismiss filed in this Court (page 4 of our Motion) we referred to our having "substantially the situation of *Wieman* v. *Updegraff*" if scienter were not implict in the prescribed oath. Both statements, of course, referred to the oaths being similar from the standpoint of considering the question of scienter, and the effect if scienter was not to be implied; but the oaths are actually far from identical and from other standpoints than the scienter question there are important differences between the two oaths.

> "This conclusion does not lead us to a decision declaring the act unconstitutional because we think it is inherent in the law that when one takes the oath that he has not lent aid, advice, counsel and the like to the Communist Party, he is representing under oath that he has not done so knowingly."

In the present case the Supreme Court of Florida discussed the question of scienter as follows:

> "It is asserted that the prescribed oath does not include an element that the maker thereof had knowledge of the subversive nature of the affiliations at the time he engaged in them. In other words, appellant contends that a man should not be held liable for a false oath if he swears to non-subversive associations when in effect, he is or has been innocently and unknowingly aligned with a subversive organization. We think this matter has been placed at rest by us as well as by the Supreme Court of the United States. In State v. Diez, Fla., 97 So.2d 105, we held that the element of scienter was implicit in each of the requirements of the statute. Conceding the essentiality of this element, we there upheld the statute with our interpretation to the effect that implied in each requirement was the presence of scienter or knowledge. Although appellant avers that this constitutes 'a judicial amendment of the statute' we find ourselves supported in such an interpretation by respectable authority." (R. 13-14).

(And as supporting the Court's position the Supreme Court of Florida here cited the Garner case and other cases decided by this Court.)

Appellant in our case raised in both the trial Court and the Supreme Court of Florida the question of whether his rights were unconstitutionally impaired by reason of scienter not being express in the Florida statute. However,

neither Appellant's Jurisdictional Statement nor his Brief on the merits makes any such claim in this Court[2] and I think we may justifiably assume that the question of scienter is now out of the case.

With the question of scienter out of the way, there is no substantial Federal question left open by the decisions of this Court so far as a requirement that a teacher swear that he is not a member of the Communist party or a member of an organization or party which believes in, or teaches, the overthrow of the Government by force or violence, is concerned. A part of the oath sustained by five of the six participating Justices in *American Communications Asso. v. Douds*, 339 U.S. 382, 70 S. Ct. 674, 94 L. ed. 925, was a provision that the affiant "is not a member of the Communist Party" (See p. 386 of 339 U.S., p. 936 of 94 L. ed.) and a part of the oath sustained in *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, 71 S. Ct. 909, 95 L. ed. 1317, was a provision that affiant is not "now" a member of or affiliated with "any group society, association, organization or party which advises, advocates or teaches * * * the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California".

In *Pockman* v. *Leonard*, 345 U.S. 962, 73 S. Ct. 951, 97 L. ed. 1381, this Court dismissed for the want of a substantial federal question an appeal seeking to review a decision of the Supreme Court of California in *Pockman* v. *Leonard*, 39 Cal. 2d 676, 249 P.2d 267, which sustained an oath prescribed by a statute that required each civil defense worker to swear that he did not belong to any organization that advocated overthrow of government by force or violence or other unlawful means.

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2. See page 14 of Appellant's Brief for a recognition that knowledge is in fact implied in the Florida statute.

In *Barenblatt* v. *United States*, 360 U.S. 109, text 128, 79 S. Ct. 1081, 3 L. ed. 2d 1115, text 1130, this Court stated:

> "This Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. See Gerende v. Board of Supervisors of Elections, 341 U.S. 56, 95 L. ed. 745, 71 S. Ct. 565; Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 95 L. ed. 1317, 71 S. Ct. 909. See also Beilan v. Board of Public Education, 357 U.S. 399, 2 L. ed. 2d 1414, 73 S. Ct. 1317, 1324; Lerner v. Casey, 357 U.S. 468, 2 L. ed. 2d 1423, 78 S. Ct. 1311, Adler v. Board of Education, 342 U.S. 485, 96 L. ed. 517; 72 S. Ct. 380, 27 A.L.R. 2d 472."

(The cases cited above in the Barenblatt case, of course, dealt not only with "those occupying or seeking public office" but with public employees as well.)

See also: *Pickus* v. *Board of Education*, 9 Ill. 8d 599, 138 N.E.2d 532; *Thorp* v. *Board of Trustees*, 6 N.J. 498, 79 A.2d 462 (Judgment vacated as moot in 342 U.S. 803, 73 S. Ct. 7, 96 L. ed. 608); *Laba* v. *Newark Board of Education*, 23 N.J. 364, 129 A.2d 273; *Fitzgerald* v. *City of Philadelphia*, 376 Pa. 379, 102 A.2d 887.

2. The Contention That Requiring a Public School Teacher (Who Swears in This Case That He Has Never Lent His Aid, Support, Advice, Counsel or Influence to the Communist Party) to File an Oath to That Effect with Public School Authorities Is to Require an Unconstitutional "Expurgatory" Oath and Is an Unconstitutional Ex Post Facto Law and an Unconstitutional Bill of Attainder Does Not Raise a Substantial Federal Question.

We do not question that if we had in this case the situation of a public school teacher who had lent aid, support, advice, counsel or influence to the Communist Party twenty or thirty years before the passage of the act here in question but who swears that he is not now a member of the Communist Party or any organization or party which believes in or teaches the overthrow of the Government of the United States or of Florida by force or violence and will not lend his aid, support, advice, counsel or influence to the Communist Party in the future, we would have a substantial federal question as to whether such a teacher could be denied public employment; but we have here no such situation.

The situation in our case was set out in the opinion of the Florida Supreme Court (R. 18-19) as follows:

> "By the allegations of his complaint, the appellant under oath affirmatively denied any present or past associations which would preclude him from executing the subject oath. He stated in his complaint '* * * that he has not, does not, and will not lend (sic) aid, support or advice (sic) counsel or influence to the Communist Party; * * *' Further, the appellant disavows any belief in the violent overthrow of either the State or Federal government. He denies membership in any organization which believes in or teaches such conduct. The complaint alleges that appellant 'is

> a loyal American' and he states that he does not decline to execute the required oath because of fear of penalties for the making of a false oath."

Appellant's complaint was sworn to by him (R. 4). The detailed allegations of paragraph 6 of the complaint which are summarized in the above excerpt from the Florida Supreme Court's opinion will be found at R. 2.

The Florida Supreme Court disposed of Appellant's bill of attainder and *ex post facto* contentions (R. 19) as follows:

> "• • • there could not possibly be a legislative adjudication of guilty for the simple reason that the complaint on which appellant stands affirmatively points out that appellant has never been connected with any organization that could result in guilt. Furthermore, as to this appellant the statute could not constitute an ex post facto law for the obvious reason that appellant asserts that he has never in the past been connected with any association which could lead to current punishment. In short, because of the allegations of his own complaint the appellant teacher has unequivocally demonstrated that he has no standing to assault the subject statute on the grounds that it is a bill of attainder, or an ex post facto law."

In the light of the allegations of Appellant's complaint the case of *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146 (D.C. Dist. Col.), affirmed without reaching this issue in *National Maritime Union of America* v. *Herzog*, 334 U.S. 854, 68 S. Ct. 1529, 92 L. ed. 1776, is of considerable interest. The facts are set out at page 154 of 78 F. Supp. as follows:

> "Although it is alleged that neither Curran, the president of the Union, nor any other officer, has executed and filed the affidavit contemplated by Sec.

> 9 (h), the complaint, verified by Curran, contains this affirmative allegation: '* * * plaintiff Curran is not a member of the Communist Party, is not affiliated with said Party, does not believe in or advocate the overthrow of the government by force and violence, is not knowingly a member of and does not knowingly support or believe in any organization which advocates such doctrines, but has not executed the affidavit required by statute for the reason that it constitutes a trespass upon and an impairment of his right of free speech, press and assembly, and for the further reason that the language of the statute is too vague, ambiguous and uncertain to establish a reasonable standard of conduct.'"

In regard to this the Court stated (p. 154 of 78 F. Supp.):

> "It thus appears that Curran has filed with us the affidavit which he asserts is unconstitutionally required by the statute. Filing with the Board an affidavit substantially similar to that contained in his complaint would prevent the denial of statutory benefits to his Union as far as his position as president is concerned. He is, consequently, quite willing and able to make the statutory affidavit but refrains from making and filing it with the Board solely because he regards Sec. 9 (h) as unconstitutional. Since he is not adversely affected by the statute, no injury can come to him as an individual because of it. It follows that he asks us to answer an academic question for him, which the courts consistently decline to do."

Right on the face of things, we submit, there can be no question that the Florida Supreme Court was correct in its holding that the subject statute is not a bill of attainder or an *ex post facto* law *as to Appellant;* and in view of the well-established rule that one may not claim standing in this Court to vindicate the constitutional rights of some third party (*Tyler* v. *Judges of the Court of Registration,*

179 U.S. 405, 21 S. Ct. 206, 45 L. ed. 252; *Liberty Warehouse Company* v. *Burley Tobacco Growers' Cooperative Marketing Association*, 276 U.S. 71, 48 S. Ct. 291, 72 L. ed. 473), there would, of course, be here no occasion for this Court to determine whether under circumstances not before the Court the subject statute might conceivably be a bill of attainder or an *ex post facto* law as to some third party. The policy of "strict necessity" in disposing of constitutional issues has been many times announced by this Court. See: *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 67 S. Ct. 1409, 91 L. ed. 1666.

A determination that the statute prescribing the clause of the oath we are now discussing could not be a bill of attainder or an *ex post facto* law as to Appellant would then leave the following as the only question actually open to Appellant to raise with regard to such clause:

Where a public school teacher before any discharge brings a suit for a declaratory decree asserting in his sworn complaint that he has never lent his aid, support, advice, counsel or influence to the Communist party, is he entitled to a declaratory decree adjudging to be unconstitutional as to him a statute requiring him as a condition to continued employment to file with the public school authorities an oath swearing to the same things that he has sworn to in such complaint?

We submit that such contention can scarcely rise to the level of a constitutional controversy. This Court has held that only those who are adversely affected by a statute can draw in question its constitutional validity in a declaratory judgment proceeding as in any other: *Alabama State Federal of Labor* v. *McAdory*, 325 U.S. 450, text 463, 65 S. Ct. 1384, 89 L. ed. 1725, text 1736. This Court has said time and time again that a party insisting upon the

invalidity of a statute, as violating any constitutional provision, must show some injury to him before the courts will listen to his complaint: *Coffman* v. *Breeze Corporation*, 323 U.S. 316, text 325, 65 S. Ct. 398, 89 L. ed. 264, text 271; *Voeller* v. *Neilston Warehouse Co.*, 311 U.S. 531, 61 S. Ct. 376, 85 L. ed. 323; *Peoples Banking Co.* v. *Sterling*, 300 U.S. 175, 57 S. Ct. 386, 81 L. ed. 586; *Premier Pabst Co.* v. *Grosscup*, 298 U.S. 226, 56 S. Ct. 754, 80 L. ed. 1155.

Not only has Appellant failed to show any injury to him by being required to file with the school authorities an oath swearing to the things that he swears to in the case itself but, if he is actually innocent of having lent aid, support, advice, counsel or influence to the Communist Party in the past, it is difficult to see how requiring him to file an oath to that effect could possibly violate his constitutional rights anyway. Such an "expurgatory" oath was sustained in *Garner* v. *Board of Public Works*, 341 U.S. 716, text 720-721, 71 S. Ct. 909, 95 L. ed. 1317, text 1323. The discussion of the Garner and other cases in *Speiser* v. *Randall*, 357 U.S. 513, text 527-529, 78 S. Ct. 1332, 2 L. ed. 2d 1460, text 1473-1475, serves to emphasize that there could be no possible constitutional objection to requiring Appellant here to reiterate before the public school officials what he had already sworn to in his complaint. As the Florida Supreme Court said (R. 19):

> "It being clear from the allegations of his own complaint that he has never been affiliated with any proscribed association, we are not persuaded that the requirement that he so state under oath could adversely affect him."

We submit that Appellant clearly does not present as to this particular clause of the oath any substantial federal question that he is entitled to raise.

But while we do not see how Appellant can possibly be held to present any substantial question that he is entitled to raise as to the clause of the oath that we are now discussing, we will nevertheless discuss three questions which Appellant discusses, or mentions, in his Brief and which deal with the clause referred to. The third of these questions we are frank to admit, we feel, would be a fairly open question if raised by a party who had a right to raise same. The first two questions we do not feel are fairly open no matter by whom raised.

These questions are: (a) Does the statute unconstitutionally require an "expurgatory" oath? (b) Does the statute unconstitutionally require the disclosure of past associations? (c) Is the statute an unconstitutional bill of attainder or *ex post facto* law as to a teacher who did knowingly lend aid, support, advice, counsel or influence to the Communist Party in the remote past knowing of its subversive nature but who has since repented?

We will discuss these three questions in the order stated:

(a) Does the Florida Statute Unconstitutionally Require an "Expurgatory" Oath?

In the light of the Garner case, the Gerende case and the Douds case, and the discussion of these cases in the Speiser case and the second Konigsberg case, it is difficult to see how Appellant's claim as to the Florida statute unconstitutionally placing the burden of proof on school teachers to prove their loyalty can be said to be an open one at all.

In *Speiser* v. *Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. ed. 2d 1460, this Court was dealing with a provision of the California Constitution that "no person or organization

which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilies" shall receive any exemption from taxes and a statute requiring applicants for tax exemption to sign a statement on his tax return declaring that he does not engage in the activities mentioned in the constitutional provision. This Court, in holding that the statute, in connection with the constitutional provision, unconstitutionally placed on an applicant the burden of producing evidence and convincing the factfinder of his innocence, recognized that this Court was there dealing with a situation different than was involved in the types of cases dealt with in the Garner, Gerende and Douds cases, as follows (pp. 527-528 of 357 U.S.):

> "The appellees, in controverting this position, rely on cases in which this Court has sustained the validity of loyalty oaths required of public employees, Garner v. Board of Public Works, 341 U.S. 716, 95 L. ed. 1317, 71 S. Ct. 909, Gerende v. Board of Supervisors, 341 U.S. 56, 95 L. ed. 745, 71 S. Ct. 565, and officers of labor unions. American Communications Asso. v. Douds, 339 U.S. 382, 94 L. ed. 925, 70 S. Ct. 674, supra. * * * The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public. The present legislation, however, can have no such justification. It purports to deal directly with speech and the expression of political ideas.
>
> * * *
>
> "Moreover, the oaths required in those cases performed a very different function from the declaration in issue here. In the earlier cases it appears that the loyalty oath, once signed, became conclusive evidence

of the facts attested so far as the right to office was concerned. If the person took the oath he retained his position. The oath was not part of a device to shift to the office-holder the burden of proving his right to his position. * * * in the present case, however, it is clear that the declaration may be accepted or rejected on the basis of incompetent information or no information at all. It is only a step in a process throughout which the taxpayer must bear the burden of proof."

In *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, 6 L. ed. 2d 105, text 118-119, this Court stated:

"In Speiser v. Randall, 357 U.S. 513, 2 L. ed. 1460, 78 S. Ct. 1332, we held unconstitutional a state procedural rule that in order to obtain an exemption a taxpayer must bear the burden of proof, including both the burdens of establishing a prima facie case and of ultimate persuasion, that he did not advocate the violent overthrow of government. * * *

"It would be a sufficient answer to any suggestion of the applicability of that holding to the present proceeding to observe that Speiser was explicitly limited so as not to reach cases where, as here, there is no showing of an intent to penalize political beliefs. Distinguishing Garner v. Board of Public Works, 341 U.S. 716, 95 L. ed. 1317, 71 S. Ct. 909; Gerende v. Board of Supervisors, 341 U.S. 56, 95 L. ed. 745, 71 S. Ct. 565, and American Communications Asso. v. Douds, 339 U.S. 382, 94 L. ed. 925, 70 S. Ct. 674, the Court said (p. 527):

" 'In these cases * * * there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. * * * Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to

penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public.'

"But there are also additional factors making the rationale of Speiser inapplicable to the case before us. There is no unequivocal indication that California in this proceeding has placed upon petitioner the burden of proof of nonadvocacy of violent overthrow, as distinguished from its other requirement of 'good moral character'. * * * Requiring a defendant in a civil proceeding to testify or to submit to discovery has never been thought to shift the burden of proof to him."

In the light of these cases we submit that the question Appellant attempts to raise as to burden of proof is not at present an open one in this Court.

(b) Does the Florida Statute Unconstitutionally Require the Disclosure of Past Associations?

Appellant, while apparently admitting (Br. 14) that the Douds, Gerende and Garner cases foreclose any contention that his rights are invaded by the Florida statute in requiring (to the extent that it does require) disclosures of current associations, contends that it is a different matter to demand information regarding past associations:

"This Court may have been willing to accept the swath cut across protected rights by an oath demanding disclosures of current associations; but it is a different matter to approve the devastation caused by an oath that demands complete information regarding all prior association, advocacy and belief."

In this connection Appellant relies on *Sweezy* v. *New Hampshire*, the concurring opinion of Mr. Justice Frankfurter in *Wieman* v. *Updegraff*, *National Association for the Advancement of Colored People* v. *Alabama*, and *Shelton* v. *Tucker*.

Do these decisions furnish any predicate whatever for invalidating a requirement that teachers as a condition to public employment make oath that they have not lent aid, support, advice, counsel or influence to the Communist Party? Manifestly, they do not.

Sweezy v. *Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311, dealt with a contempt conviction growing out of an investigation by the Attorney General of New Hampshire, conducted pursuant to a resolution of the state legislature authorizing the Attorney General to look into violations of the New Hampshire Subversive Activities Act and determine whether subversive persons were present within the state. The New Hampshire Supreme Court had sustained a conviction for contempt growing out of a witness' refusal to answer questions concerning a lecture given by him at the state university and questions concerning the Progressive Party and its adherents. This Court reversed the decision of the New Hampshire Supreme Court but the members of this Court differed as to the grounds of reversal. Mr. Chief Justice Warren and three Associate Justices rested their holding upon the failure of the state legislature to specify in its authorizing resolution that it desired the Attorney General to obtain the information to which the questions asked the witnesses related. Two other Associate Justices concurred in the result but disagreed with the holding stated in the opinion of Mr. Chief Justice Warren, grounding their conclusion on their view that the questions asked the witness infringed upon his constitutionally protected academic and political freedoms and that the state had failed to show that the infringement was justified in the protection of state interests. Two other Associate Justices dissented. Clearly this case has no bearing on our present problem.

The concurring opinion of Mr. Justice Frankfurter in *Wieman* v. *Updegraff*, 344 U.S. 183, text 194-198, 73 S. Ct. 215, 97 L. ed. 216, text 224-226, would unquestionably have great pertinence if scienter had not been held to be implicit in the provisions of our Florida statute and if our Florida statute completely tracked the Oklahoma statute in its various terms. However, with scienter implicit in each of the requirements of the Florida statute and with the differences that exist between the Oklahoma statute and the Florida statute, it is obvious on the face of things that Mr. Justice Frankfurter's concurring opinion in *Wieman* v. *Updegraff* forms no basis for invalidating our Florida statute.

In *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. ed. 2d 1488, the State of Alabama sought to secure the Association's membership list and gave as its reason that it was seeking to determine whether the Association was conducting intrastate business in violation of Alabama's corporation registration statute. This Court held that Alabama had not demonstrated an interest in obtaining the disclosures it sought which was sufficient to justify the deterrent effect which those disclosures might well have on the free exercise by petitioner's members of their constitutionally protected right of association. That case, of course, has no bearing on the case at bar.

In *Shelton* v. *Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. ed. 2d 231, this Court held invalid an Arkansas statute which compelled every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he had belonged or regularly contributed within the preceding five years. There were three opinions written in connection with the decision of this Court—

one, the opinion of the Court, and the other two, dissenting opinions. All three opinions recognized the constitutionality of requiring such a disclosure of past associations as would be involved in a teacher making the oath required by our Florida statute:

> "There can be no doubt of the right of a state to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize. * * *
>
> "This controversy is thus not of a pattern with such cases as National Asso. Advancement of Colored People v. Alabama, 357 U.S. 449, 2 L. ed. 2d 1488, 78 S. Ct. 1163, and Bates v. Little Rock, 361 U.S. 516, 4 L. ed. 2d 480, 80 S. Ct. 412. In those cases the Court held that there was no substantially relevant correlation between the governmental interest asserted and the state's effort to compel disclosure of the membership lists involved. Here, by contrast, there can be no question of the relevance of a state's inquiry into the fitness and competence of its teachers."
>
> Opinion of the Court in *Shelton* v. *Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. ed. 2d 231, text 235-236.

> "If I dissent from the Court's disposition in these cases, it is not that I put a low value on academic freedom. * * * It is because that very freedom, in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers. This process of selection is an intricate affair, a matter of fine judgment, and if it is to be informed, it must be based upon a comprehensive range of information. I am unable to say, on the face of this statute, that Arkansas could not reasonably find that the information which the statute requires—and which may not be otherwise acquired than by asking the question which it asks—is germane to that selection."
>
> Dissenting opinion of Mr. Justice Frankfurter, in *Shelton* v. *Tucker*, *supra*, text p. 242 of 5 L. ed. 2d.

> "It is surely indisputable that a State has the right to choose its teachers on the basis of fitness. And I think it equally clear, as the Court appears to recognize, that information about a teacher's associations may be useful to school authorities in determining the moral, professional, and social qualifications of the teacher, as well as in determining the type of service for which he will be best suited in the educational system. * * * Furthermore, I take the Court to acknowledge that, agreeably to our previous decisions, the State may inquire into associations to the extent that the resulting information may be in aid of that legitimate purpose. * * * All that is now here is the validity of the statute on its face, and I am unable to agree that in this posture of things the enactment can be said to be unconstitutional."
>
> Dissenting opinion of Mr. Justice Harlan, in *Shelton* v. *Tucker, supra,* text pp. 243-244 of 5 L. ed. 2d.

In *Communist Party* v. *S. A. C. Board,* ..... U.S. ....., 81 S. Ct. ....., 6 L. ed. 2d 625, text 687, the Court set out the *ratio decidendi* of *Shelton* v. *Tucker,* as follows:

> "* * * the ratio decidendi of the decision was the absence of substantial connection between the breadth of disclosure demanded and the purpose which disclosure was asserted to serve."

While it is, of course, a little ludicrous for Appellant who swears in his complaint in this case (R. 2) that he has not lent aid, support, advice, counsel or influence to the Communist Party to claim that his constitutional rights are invaded by being required to disclose to the school authorities what he sets out in his sworn complaint, nevertheless if we look at this case as if it were brought by one who had in fact lent aid, support, advice, counsel or influence to the Communist Party, it should be clear now—as clear as a great mass of litigated cases can make anything clear—that a requirement of such an oath on the

part of a school teacher as a condition to public employment does not involve any unconstitutional compulsory disclosure of past associations.

See in this connection:

Adler v. *Board of Education*, 342 U.S. 485, 72 S. Ct. 380, 96 L. ed. 517;

Beilan v. *Board of Public Education*, 357 U.S. 399, 78 S. Ct. 1317, 2 L. ed. 2d 1414;

Garner v. *Board of Public Works*, 341 U.S. 716, 71 S. Ct. 909, 95 L. ed. 1317;

Lerner v. *Casey*, 357 U.S. 468, 78 S. Ct. 1311, 2 L. ed. 1423;

Nelson v. *County of Los Angeles*, 362 U.S. 1, 80 S. Ct. 527, 4 L. ed. 2d 494;

Konigsberg v. *State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, 6 L. ed. 2d 105.

(c) Is the Florida Statute an Unconstitutional Bill of Attainder or Ex Post Facto Law As to a Teacher Who Did Knowingly Lend Aid, Support, Advice, Counsel or Influence to the Communist Party in the Remote Past Knowing of Its Subversive Nature but Who Has Since Repented?

We realize that if this question were actually open to Appellant to raise (which we do not think is the case), it would be a troublesome question for this Court to answer—particularly in view of the decision of this Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L. ed. 2d 796, where this Court held that a state court's finding that an applicant excluded from taking the state bar examination had not shown good moral character was not reasonably supported by the record notwithstanding that the record showed the applicant's admitted membership in the Communist Party from 1932 to 1940.

While the Schware case does hold that simple membership in the Communist Party (which membership might have been innocent), if it existed in the remote past, is not sufficient to bar an applicant from taking a bar examination, that, of course, is not tantamount to a holding that guilty membership in the Communist Party in the remote past would not be sufficient to bar an applicant for a public teaching position from teaching in the public school system. We respectfully submit that in view of the sensitive area in which a school teacher works, the public ought not to be required to subject young minds to the risk of being poisoned by persons who have had a guilty connection with the Communist Party in years gone by but who claim to have repented. While Communists who conceal their allegiance to the Party can do great harm in the legal profession, their opportunities for doing harm are infinitely greater in the teaching profession and we submit that the chance of that harm being done is great enough to warrant according the state the power to exclude those persons from the teaching profession.

The *Garner* case (341 U.S. 716, 71 S. Ct. 909, 95 L. ed. 1317), of course, established that the element of punishment is an essential of both a bill of attainder and an unconstitutional *ex post facto* law and that punishment is not imposed by a general regulation which merely provides standards of qualification and eligibility for employment as the ordinance prescribing the oath there in question was held to do.

In *Hawker* v. *New York*, 170 U.S. 189, 18 S. Ct. 573, 42 L. ed. 1002, this Court upheld a statute forbidding the practice of medicine by any person who had been convicted of a felony and sustained the statute as against a person who had been convicted of a felony fifteen years

before the passage of the statute; and this Court was not there impressed by the argument that the statute was unduly harsh in leaving no room for penitence:

> "It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist."

It is of particular interest to note that this Hawker case has been cited by this Court (apparently with approval) in a somewhat recent case relied on by Appellant in his Brief:

> "In disqualifying all convicted felons from union office unless executive discretion is exercised in their favor, Sec. 8 may well be deemed drastic legislation. * * *
>
> "Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas. * * * State provisions disqualifying convicted felons from certain employments important to the public interest also have a long history. See, e. g., Hawker v. New York, 170 U.S. 189, 42 L. ed. 1002, 18 S. Ct. 573. * * * The mask of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation,

such as the proper qualifications for a profession. See Hawker v. New York (U.S. text 157-160) supra."

DeVeau v. Braisted, 363 U.S. 144, 80 S. Ct. 1146, 4 L. ed. 2d 1109, text 1119-1120.

Appellant contends that the Florida statute is devoid of measures which would permit it to escape being a bill of attainder or *ex post facto* law as in the above case because it does not operate prospectively only but reaches into the past and "punishes" for past conduct since past conduct alone is ground for discharge. Appellant, of course, assumes the very thing he is seeking to establish, viz., that the requirement of the oath as a condition to employment of a teacher is intended as punishment rather than regulation. The fact is that in the DeVeau case the state was reaching into the past to the same extent as in the Florida statute. The state was saying that if a person has ever been convicted of a felony, he is disqualified from union office (unless executive discretion is exercised in his favor) just like, here, the state is saying that if a person has ever knowingly lent aid, support, advice, counsel or influence to the Communist Party knowing of its subversive nature, he is barred from teaching school in a public school system. We respectfully submit that the statute, as applied to school teachers, is a permissible regulation in determining the fitness of teachers.

We do not feel that this question of a bill of attainder or *ex post facto* is actually presented to this Court for a decision in this cause, affecting as such a decision would persons not before the Court and not Appellant at all and affecting situations that may arise in the future and not any situation that has actually arisen. But should this Court feel that the question should be decided, we respectfully submit that it is not unconstitutional to bar from employment as school teachers persons who have know-

ingly lent aid, support, advice, counsel or influence to the Communist Party knowing of its subversive nature even though such activities took place only in the remote past and such persons claim to have reformed since such time.

3. The Contention That the Florida Statute in Question Violates the First Amendment Guarantees of Freedom of Thought and Belief in the Provision of Said Statute Requiring, As a Condition to Employment As a Public School Teacher, Disavowal of Belief in the Overthrow of the Government of the United States or of the State by Force or Violence, Not Only Was Not Sufficiently Raised in or Passed on by the State Courts As to Require Decision but Would Not Raise a Substantial Federal Question If It Had Been Raised Before or Passed on by the State Courts.

We will refer later to the fact that the contention now made by Appellant that the required disavowal of belief violates constitutional guarantees of freedom of thought and belief was nowhere made in Appellant's complaint nor was such point specifically passed on by either the trial court or the Supreme Court of Florida. If the contention had been specifically made in the courts below by Appellant and passed on by such courts that the required negation of belief violated the First Amendment guarantees of freedom of thought and belief, such contention would not have presented a substantial Federal question. Such a contention is no longer fairly open in view of *American Communications Asso.* v. *Douds*, 339 U.S. 382, 70 S. Ct. 674, 94 L. ed. 925, considered with *Adler* v. *Board of Education*, 342 U.S. 485, 72 S. Ct. 380, 96 L. ed. 517, and *Speiser* v. *Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. ed. 2d 1460. Counsel for Appellant says (p. 28) that the "belief" provision in Section 9 (h) of the Labor Management Rela-

tions Act was sustained "by a 3-3 decision" in *American Communications Asso.* v. *Douds*, 339 U.S. 382, 70 S. Ct. 674, 94 L. ed. 925. That is true so far as the total provision is concerned but Mr. Justice Frankfurter by restricting his dissent to Part VII of the Court's opinion and his comments elsewhere in his dissenting opinion made it clear that he would have sustained an affidavit requirement that the person executing the affidavit did not believe in the overthrow of the United States Government by force. Compare:

> "Justice Frankfurter in a separate opinion, concurring in part, agreed that Congress could validly require disavowal of actual membership in the Communist Party or of active belief in the overthrow of the government by force, but felt that to the extent that the Section went beyond that it was invalid."
>
> Note, 11 Maryland Law Review, p. 343.

The particular disavowal of belief in the oath required by Section 9 (h) of the Labor Management Relations Act to which Mr. Justice Frankfurter took primary exception in the Douds case had to do with the required disavowal of belief in the overthrow of the United States Government "by any illegal or unconstitutional methods". Mr. Justice Frankfurter commented (p. 420 of 339 U.S.):

> "It is asking more than rightfully may be asked of ordinary men to take oath that a method is not 'unconstitutional' or 'illegal' when constitutionality or legality is frequently determined by this Court by the chance of a single vote."

Mr. Justice Frankfurter reiterated his aversion to the phrase "overthrow of government 'by unlawful means'" in his dissenting opinion in *Garner* v. *Board of Public Works*, 341 U.S. 716, text 728, 71 S. Ct. 909, 95 L. ed. 1317, text 1326:

> "How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by 'unlawful means'?"

Concern over a similar phrase was again expressed by Mr. Justice Frankfurter in his dissenting opinion in *Adler v. Board of Education*, 342 U.S. 485, text 506, 72 S. Ct. 380, 96 L. ed. 517, text 531:

> "Concern over the latitude afforded by such phrases as 'the overthrow of government by * * * any unlawful means' when positions of trust or public employment are conditioned upon disbelief in such an objective cannot be deemed without warrant."

We, of course, have in the required disavowal of belief in the present case no such phrase as "the overthrow of government by unlawful means" or "the overthrow of government by unconstitutional means". The phrase here is "the overthrow of the Government * * * by force or violence". So far as the belief provision of Section 9 (h) was concerned it appears that what prevented Mr. Justice Frankfurter from concurring with the three Justices who sustained Section 9 (h) *in toto* was his inability to delete from the belief provision the words "or by any illegal or unconstitutional methods", Mr. Justice Frankfurter stating in that connection (pp. 421 and 422 of 339 U.S.):

> "If I possibly could, to avoid questions of unconstitutionality I would construe the requirements of Sec. 9 (h) to be restricted to * * * active belief, as a matter of present policy, in the overthrow of the Government of the United States by force. But what Congress has written does not permit such a gloss nor deletion of what it has written."

(So far as the reference to "active" belief in Mr. Justice Frankfurter's opinion is concerned, it is of interest to note that in construing the Smith Act, making a felony the acquisition or holding of knowing membership in any organization which advocates the overthrow of the Government of the United States by force or violence, this Court in *Scales* v. *United States*, ... U.S. ....., 81 S. Ct. ....., 6 L. ed. 2d 782, text 797, held that the membership clause reached only "active" members. Just as "active" membership was an implied requirement of the membership clause in the Smith Act, the oath required by the Florida statute can readily be construed as dealing with active belief only as the belief that the teacher would be disavowing in taking the specified oath.)

It would be distorting the meaning of the oath required by the Florida statute to say that it encompasses a disavowal of belief in the overthrow of a dictatorial government or the overthrow of the United States Government under some conceivable set of circumstances not now existing but that the imagination might conjure up. Clearly the required disavowal of belief has to do with the objective of overthrow by force or violence of the Government of the United States (or of the State) as it now exists under the Constitution. Compare: *American Communications Asso.* v. *Douds*, 339 U.S 382, text 407, 70 S. Ct. 674, 94 L. ed. 925, text 948; *Mountain Timber Company* v. *State of Washington*, 243 U.S. 219, text 246, 37 S. Ct. 260, 61 L. ed. 685, text 700; *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd.*, 315 U.S. 740, text 746-747, 62 S. Ct. 820, 86 L. ed. 1154, text 1163.

In the Court's opinion in *American Communications Asso.* v. *Douds*, 339 U.S. 382, text 408, 70 S. Ct. 674, 94 L. ed. 925, text 949, the Court said that to attack the straw man of "thought control" is to ignore the fact that the

sole effect of the statute upon one who believes in overthrow of the Government by force and violence—and does not deny his belief—is that he may be forced to relinquish his position as a union leader. This language with reference to a union leader may well be considered in connection with the language of the Court in *Adler* v. *Board of Education*, 342, U.S. 485, text 492-493, 72 S. Ct. 380, 96 L. ed. 517, text 524, with regard to school teachers as follows:

> "It is first argued that the Feinberg Law and the rules promulgated thereunder constitute an abridgement of the freedom of speech and assembly of persons employed or seeking employment in the public schools of the State of New York.
>
> "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. American Communications Asso. C. I. O. v. Douds, 339 U.S. 382, 94 L. ed. 925, 70 S. Ct. 674. It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U.S. 75, 91 L. ed. 754, 67 S. Ct. 556. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the State of New York because first, of their advocacy of the overthrow of the government by force or violence, or secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose.
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> * * *

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."

Compare:

"Freedom from belief in force or violence as a justifiable weapon for the destruction of government is of the very essence of a teacher's qualifications. The apprehended danger is real and abiding. We have long had evidences of the pressure here of a godless ideology ruthlessly fostered by a foreign power which has for its aim the violent overthrow of government and free society. And one of its weapons is the debasement of teaching as a softening measure in the consummation of the subversive process. * * * A teacher who is bereft of the essential quality of loyalty and devotion to his government and the fundamentals of our democratic society is lacking in a basic qualification for teaching. The teacher is not obliged to take the oath; but if he refuses to do so he is not entitled to teach. * * * 'There is of necessity a close association between belief in force and teaching which is intimately related to fitness. One may not divorce one's beliefs from one's teachings.'"

Thorp v. *Board of Trustees*, 6 N.J. 498, 79 A.2d 462, text 470 (Judgment vacated as moot in 342 U.S. 803, 73 S. Ct. 7, 96 L. ed. 608).

It is to be noted that the District Court of the District of Colorado, in a decision affirmed without written opinion by the Court of Appeals for the Tenth Circuit at page 218 of 268 F.2d, treated the constitutionality of section 9 (h) of the Labor Management Relations Act as

being established by the Douds case and as being recognized by subsequent cases of this Court and not requiring discussion. Judge Knous in the case referred to (*United States* v. *Pezzati*, 160 F. Supp. 787, text 789-790) stated:

> "Section 9 (h) does not violate the Federal Constitution (American Communications Ass'n C. I. O. v. Douds, 1950, 339 U.S. 382, 70 S. Ct. 674, 94 L. ed. 925). As stated by the United States Supreme Court, the purposes of section 9 (h) are:
>
> "(1) 'to protect the public not against what Communists ' * * advocate or believe, but against what Congress has concluded they have done and are likely to do again' (American Communications Association v. Douds, supra, 339 U.S. at page 396, 70 S. Ct. at page 683);
>
> "(2) 'to wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist Party and believers in the unconstitutional overthrow of our government' (National Labor Relations Board v. Highland Park Co., 1951, 341 U.S. 322, 325, 71 S. Ct. 758, 759, 95 L. ed. 969);
>
> "(3) 'to stop the use of the Labor Board by union leaders unwilling to be limited in government by the processes of reason' (National Labor Relations Board v. Dant, 1953, 344 U.S. 375, 385, 73 S. Ct. 375, 381, 97 L. ed. 407)."

The case of *Re Summers*, 325 U.S. 561, 65 S. Ct. 1307, 89 L. ed. 1795, is an important case on this question of belief in the oath required by our Florida statute. In that case this Court upheld the refusal of a state supreme court to admit to membership of its bar an otherwise qualified person on the sole ground that he had conscientious scruples against war and would not use force to prevent wrong under any circumstances. The state

court found that such person could not swear in good faith to uphold the state constitution which required service in the militia in time of war and this Court held that refusal to permit him to practice law did not violate the First Amendment as incorporated into the Due Process Clause of the Fourteenth Amendment. While the decision of this Court was predicated on this Court's view that it was impossible to conclude that the decision of such state court violated the principle of religious freedom which the Fourteenth Amendment secured against state action when a like interpretation of a similar oath as to the Federal Constitution barred an alien from national citizenship and while the decisions barring aliens from national citizenship if they refused to take the required oath (the Schwimmer, MacIntosh and Bland Cases) were overruled by *Girouard v. United States of America*, 328 U.S. 61, text 69, 66 S. Ct. 826, 90 L. ed. 1084, text 1090, this Court gave no indication in such opinion of overruling Re Summers. So far as we have been able to determine Re Summers is still an authoritative decision.[3] While the belief provision in our Florida statute could very readily be sustained in the present case notwithstanding a rejection of Re Summers, it is difficult to see how such belief provision could possibly be deemed invalid if Re Summers is to stand. We submit that conclusion reached in Re Summers is sound and that such case should be adhered to. However, at all events we submit there is no sound basis for holding that the consti-

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3. Compare Footnote 11 to Dissenting Opinion of Mr. Justice Black in *Re Anastaplo*, U.S. , 81 S. Ct. , 6 L. ed. 2d 135, text 154: "For a similar case, see *Re Summers*, 325 U.S. 561, 89 L. ed. 1795, 65 S. Ct. 1307, in which a 5-4 majority of this Court upheld an informal order of the Illinois Supreme Court denying Bar Admission to Clyde W. Summers on the ground that his religious beliefs were inconsistent with the Illinois Constitution."

tutional rights of a school teacher are invaded by requiring him as a condition to public employment to swear that he does not believe in the overthrow of the Government of the United States or of the State by force or violence.

The contention now made by Appellant that the requirement in the subject statute that Appellant negative his belief in the overthrow of the Government by force or violence violates the First Amendment guarantees of freedom of thought and belief was not passed on by the Supreme Court of Florida (R. 11-19) or specifically referred to in the Court's opinion. Reference to Appellant's complaint (R. 1-4) will show that such contention was not specifically raised in the complaint nor was it mentioned as a specific contention in the Circuit Judge's opinion (R. 7-8). (This particular clause of the prescribed oath was not referred to at all in the Circuit Judge's opinion nor was any reference at all made to "freedom of thought" or "freedom of belief".)

It is the rule in Florida (*Henderson* v. *Antonacci*, 62 So.2d 5, text 8) as well as generally (16 C.J.S. 331-332) that courts should not voluntarily pass upon constitutional questions which are not raised by the pleadings. It is also the rule in Florida (*Smith* v. *Ervin*, 64 So.2d 166, text 171) and generally (16 C.J.S. 335-336; *Corn* v. *Fort*, 170 Tenn. 337, 95 S.W.2d 620, text 628) that one who challenges the constitutionality of an act of the Legislature must point out to the court exactly how and in what manner his constitutional rights will surely be, or have been, invaded or infringed.

Paragraph 8 of the complaint (R. 2-3) is the paragraph which sets out Appellant's attack on the subject statute. Outside of the general charge at the end of the

paragraph (R. 3) that the requirement of the oath in its entirety deprives plaintiff of due process of law, the only allegation in paragraph 8 that could conceivably have anything to do with a contention that requiring Appellant to negative the specified belief violates the guaranteed freedom of thought and belief is the first sentence (R. 2) in which Appellant asserts that the requirement that he execute the oath as a condition precedent to his continuing employment by the defendant "is a violation of his rights as a free, loyal American citizen as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States". This allegation clearly is too general and vague to present the particular constitutional claim now made and lacks the requisite specificity: 16 C.J.S. 335-339; *State* v. *Flanigan*, 349 Mo. 54, 159 S.W.2d 598; *Jewel Tea Co.* v. *Rowe*, 414 Ill. 495, 111 N.E.2d 568; *Biggs* v. *Cummins*, 5 Ill.2d 512, 126 N.E.2d 208, text 210; *Glover* v. *City of Rome*, 173 Ga. 239, 160 S.E. 249. See also: *Stembridge* v. *Georgia*, 343 U.S. 541, 72 S. Ct. 834, 96 L. ed. 1130; *Thomas* v. *Iowa*, 209 U.S. 258, 28 S. Ct. 487, 52 L. ed. 782.

The rule is, of course, well established in this Court that this Court will not on an appeal from a state court consider constitutional questions which have not been seasonably raised before or passed on by the state court: *Nelson* v. *County of Los Angeles*, 362 U.S. 1, text 9, 80 S. Ct. 527, 4 L. ed. 2d 494, text 500; *Adler* v. *Board of Education*, 342 U S. 485, text 496, 72 S. Ct. 380, 96 L. ed. 517, text 526; *Edelman* v. *California*, 344 U.S. 357, text 358, 73 S. Ct. 293, 97 L. ed. 387, text 391; *Maxwell* v. *Newbold*, 18 How. 511, 15 L. ed. 506; *Harding* v. *Illinois*, 196 U.S. 78, 25 S. Ct. 176, 49 L. ed. 394.

It is respectfully submitted that the question of whether requiring Appellant to negative under oath his

belief in the overthrow of the Government by force or violence was an unconstitutional violation of freedom of thought or freedom of belief guaranteed to him by the First Amendment (as incorporated into the Fourteenth Amendment) was not either raised in or passed on in the state courts and that, if such question had been suitably raised in or passed on in the state court, it would not have presented a substantial Federal question.

4. The Contention That the Oath Required by the Florida Statute Is Unconstitutionally Vague Does Not Present a Substantial Federal Question.

It is the contention of Appellant that the following portions of the oath required by the Florida statute are unconstitutionally vague:

(1) "I have not * * * lend (lent) my aid, support, advice, counsel for influence to the Communist Party";

(2) "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence";

(3) "I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence".

In *Osman* v. *Douds*, 339 U.S. 846, text 847, 70 S. Ct. 901, 94 L. ed. 1328, text 1329, seven out of eight of the participating Justices held the affidavit requirement of Section 9 (h) of the National Labor Relations Act to be constitutional "with regard to that part of the section which is concerned with membership in, or affiliation with, the Communist Party".

In *Adler* v. *Board of Education*, 342 U.S. 485, text 496, 72 S. Ct. 380, 96 L. ed. 517, text 526, the Court, while actually dealing directly only with the meaning of the word "subversive," held that the clause "an organization that teaches and advocates the overthrow of government by force or violence" was a clause with a very definite meaning.[4]

In *Garner* v. *Board of Public Works*, 341 U.S. 716, 71 S. Ct. 909, 95 L. ed. 1317, while no issue of vagueness was expressly passed on by the Court, the oath which the Court sustained contained among other clauses the following:

> "I further swear * * * that I * * * have not within the period beginning five (5) years prior to the effective date of the ordinance * * * advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I * * * have not, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of Florida."

The particular oath involved in *American Communications Asso.* v. *Douds*, 339 U.S. 382, 415, 94 L. ed. 925, was that the Union officer "is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods". Mr. Justice Frankfurter, who

---

4. The language of the Court being: "When used in subdivision 2 of Section 3022, the word (subversive) has a very definite meaning, namely, an organization that teaches and advocates the overthrow of government by force or violence." (p. 496 of 342 U.S.).

did not agree with some of the views of Chief Justice Vinson and the two Justices who concurred with the Chief Justice in the last mentioned Douds case and who dissented in the Garner case, had the following comments to make in his dissenting opinion in *Adler* v. *Board of Education*, 342 U.S. 485, text 506, 72 S. Ct. 380, 96 L. ed. 517, text 531, regarding the Douds case and the Garner case:

> "In these cases the Court had ground for limiting the reach of a dubious formula."

When the language of the oath involved in the present case is considered in the light of the discussion of the question of vagueness in *Scales* v. *United States*, ... U.S. ....., 81 S. Ct. ....., 6 L. ed. 2d 782, text 798, and when it is further considered that long prior to the time Appellant was asked to execute the oath prescribed by the Florida statute the Supreme Court of Florida in *State* v. *Diez*, 97 So.2d 105, text 110, had held scienter to be implicit in the Florida statute, and when it is further considered that the oath prescribed by the Florida statute does not have the particular language that was considered by Mr. Justice Frankfurter to be the objectionable part of the oath required by Section 9 (h) of the National Labor Relations Act, it is submitted that no substantial constitutional question is presented by Appellant's claim that our Florida statute is unconstitutionally vague.[5]

---

5. Compare: *Fitzgerald* v. *City of Philadelphia*, 376 Pa. 887, 102 A.2d 887, text 890; *Lohman* v. *United States*, 251 F.2d 951, text 954.

CONCLUSION.

In concluding this Brief, it is our position that our motion to dismiss the appeal should be granted; but, in the event this Court should deny the motion to dismiss the appeal, it is respectfully submitted that the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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Attorney for Appellee.

BRIEF AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 72

DAVID WALTON CRAMP, JR.,
Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR AMICUS CURIAE

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IN THE

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No. 72

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BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR AMICUS CURIAE

OPINIONS BELOW

The opinions, judgments and orders of the Supreme Court of Florida, and the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida, in this case are reported at 125 So. 2d, 554, in the first instance and are unreported in the second.

JURISDICTION

The judgment of the Supreme Court of Florida was filed November 16, 1960, petition for rehearing denied January 17, 1961, appeal to the Supreme Court of the United States was thereafter filed pursuant to 28 U.S. Code 1257(2). Order of the Supreme Court of the United States postponing jurisdiction, entered May 29, 1961.

QUESTION PRESENTED

Appellant asserts the unconstitutionality of Sections 876.05 and 876.06, Florida Statutes, which require public employees to execute the following oath:

> "I, _____, a citizen of the State of Florida and of the United States of America, and being employed by or an officer of _____ and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

Appellant attacks the prescribed oath in its entirety without specifically pointing out the wording of the oath to which a particular attack is directed. In order to clarify appellants contentions we have rephrased his question into three parts as follows:

1. Does the execution of the portion of the oath set forth below, as a condition to public employment violate the due process and equal protection clauses of the Fourteenth Amendment:

> "I am not a member of the Communist Party;" . . .
> "I am not a member of any organization or party that believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of the State of Florida by force or violence."

2. Does the requirement that an employee, as a condition to public employment, avow that, . . .

> "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence"

violate First Amendment guaranties of freedom of speech, thought and association.

3. Does the requirement that an employee file an oath that

> "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party"

constitute a bill or attainder and an ex pos facto law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10, of the Constitution of the United States provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

F.S. 876.05 provides:

> "All persons who are now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgements of instruments for public record in the state in the following form:
>
> 'I, _____ , a citizen of the State of Florida and of the United States of America, and being employed by or an officer of _____, and

a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.'

"And said oath shall be filed with the records of the governing official or employing governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation."

F.S. 876.06 provides:

"If any person required by § § 876.05-876.10 to take the oath herein provided for fails to execute the same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving."

STATEMENT OF THE CASE

David Walton Cramp, Jr., appellant herein, was an employee of the Board of Public Instruction of Orange County, Florida. Shortly prior to the institution of this litigation (January 11, 1960) appellant refused to execute the oath prescribed by Section 876.05, Florida Stat-

utes. Upon such refusal, appellee school board recommended appellant be discharged pursuant to Section 876.06, Florida Statutes. Appellant instituted suit in Circiut Court of the Ninth Judicial Circuit in and for Orange County for declaratory relief pursuant to Section 87.01, Florida Statutes, to ascertain whether or not the oath was constitutional and if he had to sign the oath as a condition of his continuing employment. On March 16, 1960, the Circuit Court declared the statute valid. The Supreme Court of Florida, on appeal, affirmed the court below in its opinion filed November 16, 1960. This appeal to the Supreme Court of the United States followed.

SUMMARY OF ARGUMENT

As indicated in the Question Presented appellant attacks the prescribed oath in its entirety without specifically pointing out the wording of the oath to which a particular attack is directed:

Our argument deals separately with each rephrased portion of the question.

1. The execution of the portion of the oath that I am not a member of the Communist Party and do not belong to an organization that believes in the overthrow of the government by force or violence does not violate the due process and equal protection clause of the Fourteenth Amendment. This section merely prescribes the execution of an affidavit as a condition of employment. The question of scienter is implicit. The denial by a state of employment is not a denial of a property right secured by the due process clause.

2. The requirement that an employee avow disbelief in the overthrow of the Government by force and violence does not infringe upon First Amendment freedoms. This question is not one which can properly by raised by the appellant at this time. Even if it could be raised ample authority supports the validity of similar requirements. No restriction of speech or thought is involved.

3. The requirement that an employee swear he has not lent his aid, support, advice, counsel or influence to the Communist Party is constitutional even if applied to the remote past. As to this contention, the appellant again is not entitled to raise the question as it could not possibly adversely effect him.

ARGUMENT

1. Does the execution of the portion of the loyalty oath set forth below, violate the due process and equal protection clauses of the Fourteenth Amendment:

> **"I am not a member of the Communist Party;" ...**
> **"I am not a member of any organization or party that believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of the State of Florida by force or violence."**

The appellant readily admits that a state may exclude from its employ knowing members of the Communist Party, or others advocating as an objective, the violent and forcible overthrow of the Government.

Appellant objects to the method used by Florida to accomplish this exclusion, contending that the wording

of the portion of the Florida oath in question violates the due process and equal protection clauses of the Fourteenth Amendment.

We fully agree that under the due process and equal protection clauses of the Fourteenth Amendment that states are prohibited from depriving any person of life, liberty, or property without due process of law.

We do not agree that the execution of the oath as a requisite of employment deprives a person of these basic freedoms. It is evident from the face of this provision of the Fourteenth Amendment that before a party can properly invoke the due process clause, he must show wherein the particular law deprives him of life, liberty or property. The appellant cannot so do. The section in question prescribes the execution of an affidavit as a condition of employment and of receiving compensation from the State. In effect, it sets one of the terms with which one must comply who desires to obtain or continue public employment. The United States Supreme Court has pointed out that the loss of a particular position is not the loss of life or liberty. (*American Communications Association v. Douds*, 339 U.S. 382, 409, 94 L. Ed. 925, 949) And that an "unlawful denial by state action of a right to a state political office is not a denial of a right of property or of liberty secured by the due process clause." (*Snowden v. Hughes*, 321 U.S. 1, 7, 88 L. Ed. 497, 502). There is no indication that the cited statute denies compensation for services rendered prior to its effective date.

While it is recognized that government has the power to exclude from public employment communists and others who advocate its violent overthrow (*Adler v. Board of Education*, 342 U.S. 485, 96 L. Ed. 517), requirements of due process are considered applicable to the means adopted to implement the power. A state may validly provide that a person who is knowingly a member of an organization which advocates the overthrow of constitutional government by unlawful means shall not be eligible for public employment. (*Adler v. Board of Education*, 342 U.S. 485, 96 L. Ed. 517) But a law which disqualifies on the basis of mere membership regardless of any awareness of the organization's purpose or character is said to be arbitrary and void. (*Wieman v. Updegraff*, 344 U.S. 183, 97 L. Ed. 216)

Relying on the rule in the Wieman case, the appellant contends the oath is objectionable for lack of scienter. This argument cannot be sustained. The affidavit's negation is limited to knowing membership in subversive organizations. We cannot accept appellant's suggestion that the word "knowingly" refers to knowledge of whether the affiant is a member rather than knowledge of the character of the organization. The provision must be given a reasonable, commonsense interpretation. The affiant obviously would know the facts of his own membership as reasonably construed. The affidavit negates only membership in organizations known to have the prescribed character. It does not affect persons who might have innocently formed or continued affiliations with this subversive organization unaware of its nature or purpose. The subject matter of the affidavit is clearly one

upon the basis of which the state may determine the fitness of its employees. (*Adler v. Board of Education*, 342 U.S. 485, 96 L. Ed. 517) It is limited to present membership or affiliation. The United States Supreme Court in the *Garner case*, 341 U.S. 716, 95 L. Ed. 1317, where a similar oath was challenged as violating due process because not limited to organizations known by the employee to be within the prescribed class, stated:

> "this argument was rejected because we felt justified in assuming that scienter was implicit in each clause of the oath."

The Florida Supreme Court expressed the same view in *State v. Diez*, 97 So.2d 105:

> "This conclusion does not lead to a decision declaring the Act unconstitutional because we think it is inherent in the law that when one takes the oath that he has not lent aid, advice, counsel and the like to the Communist Party, he is representing under oath that he has not done so knowingly."

In *Pockman v. Leonard*, 345 U.S. 962, 73 S.Ct. 951, 97 L. Ed. 1381, this Court dismissed for the want of a substantial Federal question an appeal seeking to review a decision of the Supreme Court of California in *Pockman v. Leonard*, 39 Cal. 2d 676, 249 P. 2d 267, which sustained an oath prescribed by a statute that required each civil defense worker to swear that he did not belong to any organization that advocated overthrow of government by force or violence or other unlawful means.

Appellant, in his complaint, avers under oath that he is not a member of the Communist Party and that he is

not a member of any organization or party, which believes in, or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.

We conclude that neither the execution, by the appellant of the portions of the oath discussed herein, nor failure to so execute the oath deprives him of life, liberty or property within the meaning of the due process clause.

2. Does the requirement that an employee, as a condition to public employment, avow that

> **"I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence"**

violate First Amendment guaranties of freedom of speech, thought and association?

> The pertinent wording complained of is as follows: "I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence."

By the allegations of his complaint, appellant disavows any belief in the violent overthrow of either the State or Federal Government. The contention now made by appellant that the required disavowal of belief violates constitutional guaranties of freedom of thought and of speech, was no where made in appellant's complaint, nor were such points specifically passed on by either the trial court or the Supreme Court of Florida. Even if, such

contentions were properly before the court it would not be an unwarranted restriction upon freedom of thought or speech. An affidavit requirement similar in scope, was held valid in *American Communications Association v. Douds*, 339 U.S. 382 70 Supreme Court, 674, 94 L. Ed. 925. That case involved the non-communist affidavit provision contained in Section 9H of the Labor Management Relations Act. The section requires, as a condition to labor unions receiving the benefits of facilities provided by the act that each of its officers file an affidavit stating that he is not a member of or affiliated with the Communist Party, and that he does not believe in and is not a member of or supports any organization that believes in or teaches the overthrow of the Government by force or other illegal methods. In a lengthy opinion, the court disposed of numerous attacks on constitutional grounds and concluded as follows: 339 U.S. 415, 94 L. Ed. 952-953.

> "Clearly the Constitution permits the requirement of oaths by officers to uphold the Constitution itself. The obvious implication is that those not willing to take such oath are to be barred from public office. For the President a specific oath was set out in the Constitution itself. Article II, Section 1. And Congress has detailed an oath for other federal officers. Obviously the framers of the Constitution thought that the exaction of minimal loyalty to the government was worth the price of whatever deprivation of individual freedom of conscience was involved. All that we need to hold here is that the casting of Section 9(H) into the mold of an oath does not invalidate it, if it is otherwise constitutional. We conclude that Section 9(H) of the Labor Management Relations Act as herein construed is compatible with the Federal Constitution and may stand."

This requirement obviously was a reasonable attempt to accomplishing the purpose of eliminating communists and other subversive persons from holding office. Further, appellant's contention is not valid in view of the Decisions of the Supreme Court of the United States in *Adler v. Board of Education*, 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517 and *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460. The appellant also asserts that the law in question is an unwarranted denial of the right to speak. He fails to point out the way in which he considers such right to be involved here. The statute simply provides for the execution of affidavit of fact. It does not purport to limit or restrict the right of employees to speak or assemble.

The contention made in appellant's brief that the disavowal of belief violates First Amendment guaranties was not passed on by the Supreme Court of Florida or specifically referred to in the Courts opinion. Neither was such contention raised in appellant's complaint.

It is the rule in Florida (*Henderson v. Antonacci* 62 So. 2d 5, Text 8) that courts should not voluntarily pass upon constitutional question not raised in the pleadings. The rule is also well established that this Court will not consider constitutional questions which have not been properly raised before or passed on by the state court. (*Nelson v. County of Los Angeles*, 362 U.S. 1, Text 9, 80 S. Ct. 527, 4 L. Ed. 2d 494, Text 500.)

3. Does the requirement that an employee file an oath that

"I have not an will not lend my aid, support, advice, counsel or influence to the Communist Party,"

constitute a bill of attainder and an ex post facto law?

The remaining portions of the oath in question are as follows:

> "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party;"

Appellant contends that this portion of the oath constitutes a bill of attainder and an ex post facto law. Appellant loses sight of the fact that the statute does not purport to designate a crime or offense for which punishment is imposed, but merely prescribes a standard of eligibility. In (*Garner v. Board of Public Works*, 341 U.S. 716, 95 L. Ed. 1317) an ordinance required every city employee to execute an affidavit disclosing any past or present membership in the Communist Party. In upholding the validity the Supreme Court pointed out that the city or state is not disabled from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment." The negation required in the case involved, being limited, not to past membership, but to past or present aid, support, advice, counsel or influence, is even less subject to objection.

Its content is similar to that upheld in *Gerende v. Board of Supervisors*, 341 U.S. 56, 95 L. Ed. 745. The

claim that the oath constitutes the bill of attainder is likewise without merit. Bills of attainder are legislative acts inflicting punishment on certain persons without judicial trial. No punishment is inflicted by the statute which merely prescribes standards of eligibility for public employment. The Florida Supreme Court disposed of appellants bill of attainder and ex post facto contentions as follows:

> ". . . There could not possibly be a legislative adjudication of guilt for the simple reason that the complaint upon which appellant stands affirmatively points out that appellant has never been connected with any organization that could result in guilt. Furthermore as to this appellant the statute could not constitute an ex post factor law for the obvious reason that appellant asserts that he had never in the past been connected with any organization which could lead to current punishment. In short, because of the allegations of his own complaint, the appellant teacher has unequivocally demonstrated that he has no standing to assault the subject statutes on the grounds that it is a bill of attainder, or an ex post facto law." (*Cramp v. Board of Public Instruction of Orange County, Florida*, 125 So.2d 554)

The Florida Supreme Court's position in this matter is further substantiated by the ruling in *National Maritime Union of America v. Herznog*, 78 F. Supp. 146, (D.C. Dist.) affirmed in 344 U.S. 854, 68 S. Ct. 1529, 92 L. Ed. 1776.

We do not question that if this case involved a public employee who had in fact lent aid, support, advice, coun-

sel or influence to the Communist Party, but who now disavows or disclaims present membership or belief, we would have a substantial federal question as to whether such person could be denied public employment.

SUMMARY

Appellant has contended that the execution of the Florida Loyalty Oath as a requisite of public employment violates the due process and equal protection clause of the Fourteenth Amendment; infringes upon the guaranties of freedom of speech, thought and association of the First Amendment; and is an ex post facto law and bill of attainder.

An examination of relevant authorities and precedents reveals the Florida oath to be similar in scope and effect to the several oaths upheld by the Supreme Court of the United States as not violating constitutional guaranties.

Further examination leads us to take the position that even if the Florida Oath might be construed to be in violation of the rights of certain individuals, that appellant's particular situation is such that he has no standing to assert its invalidity.

CONCLUSION

As we conclude, it should be made clear that the Attorney General of Florida is vitally concerned with the preservation of the constitutional rights of the citizens of this state to assemble, speak, think and believe as they will, but the Attorney General thinks it is equally clear

that a state has the right, power and duty to preserve its own integrity. No citizen has the unqualified right to become a public school teacher upon his own terms, or to become a public employee. He may be employed by the State upon the reasonable terms promulgated by the Legislature of the State. In the event he does not choose to work on those terms he is at liberty to retain his beliefs and associations and go elsewhere.

Public employees occupy unique and critical positions in public life. As applies to public school teachers, the problem is particularly acute. The teacher molds and shapes the minds of his students and directs them toward their ultimate goal of assuming a useful role in the society in which they live. The state has a vital concern and a tremendous responsibility in this respect. An educated person is characterized by his ability to reason, think and analyze in an objective matter, carefully considering all facts and issues before making a decision. The duty devolves upon the state public school system to insure that instructional personnel are sincere, loyal citizens capable of imparting objective ideals in the minds of their students.

In the current struggle for men's minds, we believe the state, both morally and legally, is well within its province of insuring integrity and loyalty to our form of government in the educational process as against those who would pervert it to subversive ends.

As to the effectiveness of the Florida oath in accomplishing this goal we cannot argue. The Florida Legisla-

ture, in its wisdom enacted the measure utilizing as a guide both the Federal government's and other states' attempts to forestall the impending infiltration into public life of those persons whose avowed purpose is the overthrow of the democratic system of government.

We conclude, that the execution of the Florida oath, as a requisite of public employment is a reasonable and constitutional means of accomplishing the Legislative purpose.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, Ralph E. Odum, Attorney for the State of Florida as amicus curiae and a member of the Bar of The Supreme Court of the United States, hereby certify that on _____ _____ September, _____, 1961, I served copies of the foregoing brief for the Attorney General of Florida as amicus curiae on the attorney for the appellant, Tobias Simon and Appellee, the Board of Public Instruction of Orange County, Florida, by mailing a copy thereof in a duly addressed envelope with postage prepaid to the office of Tobias Simon, 706 Ainsley Building, Miami, Florida, and to the office of J. R. Wells, Esquire, c/o Maguire, Voorhis and Wells, 135 Wall Street, Orlando, Florida.

_____

Ralph E. Odum